

No. 11137

United States
Circuit Court of Appeals

For the Ninth Circuit.

R. J. REYNOLDS TOBACCO COMPANY,
a Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY
ANN NEWBY, both minors, by their guardian
ad litem, George H. Newby,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 331 to 541

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

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OCT 25 1945

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Upon Appeal from the District Court of the United States
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L. R. DONNELLY,

recalled for cross examination under the rule by the plaintiffs, having been heretofore duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Mr. Donnelly, was Clark County, Idaho, in Mr. Hair's territory as a salesman for the Reynolds Tobacco Company during the year 1939?

A. Yes, sir.

Q. And was it in his territory during the year 1940? A. Yes, sir.

Q. And was it in his territory during the year 1941? A. Yes, sir.

Q. And during the year 1942?

A. Yes, sir.

Q. Was it in his territory during all of the time he worked for you in Idaho?

A. Yes, sir.

Mr. Davis: That is all.

Mr. Merrill: No questions.

SID CLOSE,

being recalled, having heretofore been duly sworn, testifies as follows:

Direct Examniation—(Continued)

By Mr. Davis:

Q. You understand from the ruling of the Court that your answer to the last question asked will be "good" or "bad," if his reputation was that of

(Testimony of Sid Close.)

a good, careful, sober driver then your answer will be "good" and if not, then your answer will be "bad," you understand that, do you?

A. Yes, sir.

Q. All right, what was that reputation?

Mr. Merrill: And we make the same objection.

The Court: Yes, and he may answer.

A. Bad.

Mr. Davis: That is all, you may examine.

Q. Did you ever see Mr. Hair in an accident?

A. Yes, sir.

Q. What accident?

A. What kind of accident,—oh no, I never saw him in an accident.

Q. You never saw him driving an automobile under the influence of liquor?

A. Yes, sir.

Q. When was that, in 1939?

A. Yes, sir.

Q. How many times? [376]

A. Once that day.

Q. He had no accident that day?

A. No, sir, not that I know of.

Q. He had no accident that you know of?

A. Only what I heard about this other place.

Q. You are basing your conclusion on what these other officers said about Hair's reputation, and the other trial that you attended?

A. No, sir.

Q. Then upon what do you base it?

A. What I saw myself.

Q. On what you saw?

A. Yes, sir.

Q. And nothing else?

A. No, sir.

Mr. Merrill: Now we move to strike his testi-

(Testimony of Sid Close.)

mony touching the reputation be stricken, he testifies that it is based on his own knowledge and nothing else.

The Court: It may be stricken.

Mr. Merrill: That's all.

Redirect Examination

By Mr. Davis:

Q. Do you know, did he have a reputation in your county other than just your own personal opinion? A. Yes, sir. [377]

Mr. Merrill: We object to that, it is no way to prove reputation.

The Court: The answer may stand.

Q. What was that general reputation in your community as to whether he was a drunken, reckless driver or a sober, careful driver? Answer that good or bad.

Mr. Merrill: We make the same objection to this question that we heretofore made to it.

The Court: I think this is repetition,—perhaps not, in the state the record is in now. He may answer.

A. Bad.

Mr. Davis: That is all.

Recross Examination

By Mr. Merrill:

Q. Where did you get the opinion that you say his reputation was bad?

A. From several parties.

(Testimony of Sid Close.)

Q. Who?

A. I wouldn't say who, but I had several parties ask me why I didn't pick up that fellow for reckless driving.

Q. That was the time back in 1939?

A. No. I heard since that time, and before then.

Q. They ask why you didn't pick him up?

A. Yes, sir.

Q. That is all you heard. [378]

A. Yes, sir.

Q. They asked why you didn't pick him up?

A. Yes, sir.

Q. Who are they?

A. The attorney there for one.

Q. Who is he? A. Bill Renfrew.

Q. That is the only time anyone spoke to you about it?

A. Before I arrested him.

Q. Not since that time? A. Yes, sir.

Q. You mean you never heard anything since that time? Since 1939? A. Oh, yes.

Q. What?

A. That he was a reckless driver.

Q. But you can't tell us who it was that told you? A. No, sir.

Q. Nor anyone that said anything like that?

A. No, sir.

Q. Nor where you got the information?

A. No.

Mr. Merrill: That is all.

(Testimony of Sid Close.)

Mr. Davis: That's all. [379]

Mr. Merrill: We move to strike the testimony of this witness as being incompetent, irrelevant and immaterial. It does not meet the necessary requirement of such testimony in that there is no showing that it came to the knowledge of defendants or either of them.

The Court: The motion will be denied for the present, it may stand.

BEN BUSKIRK,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Ben Buskirk.

Q. Where do you live? A. Boise, Idaho.

Q. What is your business or profession?

A. Police officer.

Q. Prior to living in Boise, where did you live?

A. Pocatello.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. I call your attention to the Myers incident in April 1939. Did you see Mr. Hair on that morning? I think it was the 15th of April.

A. Yes, sir. [380]

(Testimony of Ben Buskirk.)

Q. Where?

A. I saw him on two different occasions.

Q. Where? A. At the El Rio night club.

Q. Did he have a motor vehicle?

A. Well, it was setting in front of the building.

Q. Did you notice any writing on that car, or any advertising? A. Yes, sir.

Q. What did it have on it,—the car?

A. Reynolds,—R. J. Reynolds Tobacco Company.

Q. Did you see Mr. Hair later?

A. Yes, sir.

Q. In that same truck or car? A. Yes, sir.

Q. Where was he the second time?

A. I saw him going through the underpass on Center going east.

Q. On Center street? A. Yes, sir.

Q. What time was that?

A. Around four or four-thirty in the morning.

Q. Was anybody in the truck with him at that time? A. Yes, sir.

Q. Was it a man or woman? A. Man.

Q. Later you saw him at the El Rio Club?

A. Earlier.

Q. Did you see Hair's companion or passenger prior to the time he went under the underpass?

A. No, sir, I never noticed anyone before that, in the truck.

Q. Did you later learn who was with him in that truck? A. Yes, sir.

Q. Who was with him?

(Testimony of Ben Buskirk.)

A. His name was Eckersley.

Q. Mr. Buskirk, do you know the general reputation in this community of Mr. Hair, confining your answer to 1939, 1940 and 1941, in this community for being a drunken, reckless or a sober and careful driver? Do you know that reputation?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid. The question is bad in form. No proof that any such information, if such existed, ever came to the defendants' knowledge.

The Court: Did this witness live here during that period of time?

Q. Did you live in Pocatello in 1939, 1940 and 1941? A. Yes, sir.

The Court: He may answer.

A. Yes, sir.

Q. What was that reputation?

Mr. Merrill: We make the same objection.

The Court: Same ruling.

A. It is bad.

Mr. Davis: That's all, Mr. Buskirk.

Cross Examination

By Mr. Merrill:

Q. When did you first become acquainted with Mr. Hair?

A. After this Myers incident, I knew him by sight before that.

(Testimony of Ben Buskirk.)

Q. Before that you never saw anything out of the way about him, did you Mr. Buskirk?

A. I never noticed him before.

Q. Before the so-called Myers incident there was never anything wrong so far as you know?

A. I didn't know him before.

Q. You never heard anything?

A. No, sir.

Q. You were one of the officers that investigated the Myers incident, were you?

A. No, sir.

Q. You were one of the officers connected with that case in some way? A. No, sir.

Q. You made an examination of it?

A. No, sir.

Q. You testified here before? [383]

A. I was following in my personal car.

Q. You were a police officer then?

A. No, sir.

Q. When did you become a police officer?

A. September 9, 1941.

Q. You worked under Mr. Pugmire?

A. Mr. Pugmire was just leaving and I think Mr. Rubideaux came in as Chief of Police.

Q. The Myers incident was the only incident that you had personal knowledge of, was it?

A. I don't understand the question.

Q. The Myers incident was the only incident of which you had personal knowledge of Mr. Hair's driving that could be considered in anywise out of the way? A. It is a long time since then.

(Testimony of Ben Buskirk.)

Q. I mean now, between the date of the Myers incident and September 1942? A. No, sir.

Q. What else?

A. Just general talk of the police officers and the public.

Q. Who of the public did you hear?

A. The general public.

Q. Mr. Buskirk, can you give us a single name?

A. - I will say no to that question. [384]

Q. As a matter of fact, you only have knowledge of one incident and that was the Myers incident where any reckless driving was thought of or charged against him, that is a fact, isn't it?

A. Other than what I just testified to?

Q. That is the only incident of which you had any personal knowledge, that is a fact is it?

A. As far as an accident or anything of that sort is concerned, yes, sir.

Q. Then you had no knowledge of any accident or any improper driving on the part of Mr. Hair or charged against him between the time of the Myers incident and the happening at Montpelier, which we are trying now?

A. No official report.

Q. No official report came in against him between those two dates, that you know of?

A. No, sir, no official report.

Q. Such information as you have is what you talked over with Pugmire? A. No, sir.

Q. With Mr. Pugmire and other officers?

(Testimony of Ben Buskirk.)

A. Just what other officers have seen on the street.

Q. What officers talked to you?

A. I cannot say off-hand.

Q. You can't give the name of any of them?

A. No, I don't think so.

Q. You know what the National Safety Council incorporated is do you? A. Yes, sir.

Q. Are you a member? A. No, sir.

Q. Have you attended their meetings?

A. Yes, sir.

Q. You know that they give awards?

A. Yes, sir.

Q. For careful and experienced driving?

A. Yes, sir.

Q. These awards are not given to those who have bad reputations, are they?

Mr. Davis: I object to that as calling for a conclusion of the witness.

The Court: I think he may answer.

A. They are based on reports. The point is that the most important thing is if an accident is not reported for a year I think that is as far as the examination goes.

Q. Do you have any definite information on that? A. I cannot quote any authority.

Q. You know that they give awards to those reported to be careful drivers? A. Yes, sir.

Q. One to whom such an award is given is considered as such careful driver in this community?

(Testimony of Ben Buskirk.)

Mr. Davis: Objected to as calling for a conclusion of the witness.

The Court: Sustained.

Q. Would such an award be given to one who had a bad reputation for driving?

Mr. Davis: Objected to as calling for a conclusion, and it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Merrill: That is all.

Mr. Davis: That's all.

Mr. Merrill: I move that the testimony of the witness be stricken on the ground that it appears that it is not based on the general reputation in the community. That there is no sufficient evidence supporting it; that it is incompetent for any purpose, no sufficient evidence to support it and that it didn't come to the attention of the defendants or either of them.

The Court: I think he did say that he heard it generally discussed. The motion will be denied. The weight of the testimony will be a question for the jury.

FREDERICK SMULLEN,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

(Testimony of Frederick Smullen.)

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. Frederick H. Smullen.

Q. Where do you live?

A. Pocatello, Idaho.

Q. How long have you lived there?

A. For twenty-eight years.

Q. What is your business or occupation?

A. Police officer.

Q. Do you know Rulon D. Hair?

A. I know him by sight.

Q. You know him by sight? A. Yes, sir.

Q. Were you on duty as a police officer in the morning of April 15, 1939? A. Yes, sir.

Q. Did you see Mr. Hair at that time?

A. Yes.

Q. Did you see him in any kind of vehicle?

A. Yes, sir.

Q. What kind of vehicle or conveyance was he driving? A. A panel body truck. [388]

Q. That was at the time of the Myers accident?

A. Yes, sir.

Q. Did he have a passenger with him at that time? A. Two got out of the car or truck.

Q. Who got out besides Mr. Hair?

A. A man got out that gave his name as Eckersley.

Q. Did you know of a search made of the truck at that time?

(Testimony of Frederick Smullen.)

A. I took Mr. Myers to the hospital and didn't go back for some little time.

Q. What was Mr. Hair's condition at that time, as to whether he was intoxicated or not?

Mr. Merrill: Objected to as calling for a conclusion of the witness, it is incompetent and no proper foundation is laid for such a question.

The Court: The objection is overruled.

A. He appeared to me as though he was intoxicated.

Q. What was the appearance of Mr. Eckersley?

A. He appeared to me as though he was intoxicated, too.

Q. You have lived in Pocatello during all of the time you have been on the police department?

A. Yes, sir.

Q. Then, during the last ten years you have lived here? A. Yes, sir.

Q. Did you, or do you know the reputation of Rulon D. Hair in this community as to being a reckless, drunken [389] driver, or a sober, careful driver? A. No.

Q. You don't know? A. No, sir.

Mr. Davis: That's all.

Mr. Merrill: No questions.

Mr. Davis: We offer in evidence plaintiff's exhibit 24, being a certified copy of the information in the case of State v. Hair and the jury's verdict. We offer it for the purpose, not of proving the fact, but of proving notice to Mr. Donnelly the agent of the Company who has personally at the trial, for

the purpose of showing the charge against Mr. Hair of which Donnelly had notice and knowledge.

Mr. Merrill: Objected to as incompetent, immaterial and irrelevant and no proper foundation is laid and it does not prove any issue in this case and is contrary to the decision of the Court in the case before.

The Court: I think Mr. Donnelly testified quite fully about this. The objection is sustained.

Mr. Davis: If the Court please, I now offer in evidence exhibit H in the deposition of Mr. Darr at page 36 which the Court ruled I might reoffer at this time. [390]

Mr. Merrill: To which we object upon the ground that it is incompetent, irrelevant and immaterial for any purpose and does not prove or tend to prove any matter involved here; that there has been no different presentation of the evidence since your Honor ruled it was inadmissible. The matter contained therein is not pertinent to this case, and it may be misunderstood and prejudicial.

Mr. Davis: First, if your Honor please, I offer to prove, and now ask permission to read to the jury the Caption of the complaint as found on page 23 of Plaintiff's exhibit "A" in the Deposition of Mr. Darr, the caption of the suit,—or of the complaint rather, shows a suit by Bertha Myers and others against the Reynolds Tobacco Company, Donnelly and Hair, being the complaint produced by Mr. Darr in his testimony that they sent certain exhibits to the attorneys, and I would like to read

sufficient of paragraph five on page 24 of the Deposition of Mr. Darr to show that it was charged against the Company, that Hair had full authority to operate their trucks,—down to the semi-colon on page 25 which I have marked for your Honor, and then I ask permission to read the prayer of the Complaint showing the demand for damages and relief sought, and the date the summons was served and the certification or verification. [391]

Mr. Merrill: We object to this as incompetent, irrelevant and immaterial, and does not prove or tend to prove any issue in this case. We have spent more time trying the Myers case than the case at bar.

The Court: It will be admitted, except the prayer for judgment. Just leave out the amount prayed for, the damages.

Mr. Merrill: May we have our objection go to that?

The Court: Yes.

Mr. Davis: Now on page 36 the last paragraph on that page. That being a letter from Mr. Roe to the Reynolds Tobacco Company bearing date of April 23, 1939, and being Plaintiff's exhibit H in Mr. Darr's deposition.

Mr. Merrill: May we have the same objection to this offer?

The Court: Yes, and I will admit that part reading: "As soon as we arrived in Pocatello, we called on Mr. Black, who is Mr. Hair's attorney. He rehearsed the accident to us right from his

window as the street is in plain view from his window.”

Mr. Black: I think the other portion about getting him out on parole and from information he had the case would come up in June, should go in.

The Court: I will admit the first part as I indicated.

Mr. Davis: The record may show I offered all of it.

The Court: Yes, it may so show.

Mr. Davis: Now on page 37, I offer the last two paragraphs on the page.

Mr. Merrill: We would like to have our same objection to that offer.

The Court: It may be admitted.

Mr. Davis: Now on page 38, the second and third paragraphs on that page.

Mr. Merrill: To which we object on the ground that it would be incompetent, irrelevant and immaterial and prejudicial. It doesn't tend to prove any issue in this case.

The Court: I cannot see that this is material, I will sustain that objection.

Mr. Davis: I offer the last paragraph on page 38 and over on the other page. I offer this because of the advertising feature.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case.

The Court: That may be admitted. [393]

Mr. Davis: Now, I want to reoffer my exhibit 24 with this explanation. If your Honor please,

while Mr. Donnelly testified about this trial it is not in the record what this man was tried for. The information states what he was tried for; that he drove a motor vehicle upon a public highway carelessly and heedlessly without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor and that by reason of the acts afore alleged, the automobile driven by the defendant as aforesaid, without malice, did strike one Jacob Myers. I want to call this to your Honor's attention. This is in the correct name of Rulon D. Hair. In the other trial it was denied this was the same person in the Clark County case. But this is in the correct name. There is something said in the opinion of the Circuit Court that they are not required to search the records,—now here is the record,—a record of conviction that shows the charge in the proper name, used at the trial which Mr. Donnelly attended. (Further argument.)

Mr. Merrill: We certainly object to the introduction. The only thing it tends to prove was the Myers incident, which was absolutely held to be [394] error and not sufficient to establish or prove or brand this man as an incompetent driver. There is no foundation laid and it would be prejudicial.

The Court: I think it is admissible under the ruling of the Circuit Court when it was up before. At that time they said the record was not constructive notice and the absence of proof was not sup-

plied. Here we have, not only the presumption of notice, but the actual knowledge of the Court record itself. I will admit it at this time.

I suggest at this time that there may be another serious question raised as to this and I will admit it at this time and it may remain in the record so that if it is submitted to the jury you can use it or refer to it in your argument to the jury, and not read it at this time.

PLAINTIFF'S EXHIBIT No. 24

Admitted Mar. 21, 1945

Prosecuting Attorney's Information.

Examination Held.

In the District Court of the Fifth Judicial District
of the State of Idaho, within and for the
County of Bannock

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

PROSECUTING ATTORNEY'S
INFORMATION

C. M. Jeffery, Prosecuting Attorney in and for Bannock County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Bannock, State of Idaho on the 19th day of May, 1939, and gives the Court

to understand and be informed that Rulon D. Hair is accused by this information of the crime of Involuntary Manslaughter which said crime was committed as follows, to-wit: That the said Rulon D. Hair on or about the 15th day of April, 1939, and before the filing of this information at Pocatello in the County of Bannock, State of Idaho, then and there being, did then and there knowingly, willfully, unlawfully and feloniously drive and operate a motor vehicle upon a public highway, to-wit: The streets of Pocatello, State of Idaho, and particularly on East Center Street, at a point in the three hundred block of said street, carelessly and heedlessly in wilful and wanton disregard of the right and safety of others, without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor, and that by reason of the acts afore-alleged, the automobile driven by the defendant, as aforesaid, without malice, did strike one Jacob Meyers, a human being, thereby inflicting upon the said Jacob Meyers mortal wounds from the effect of which he, the said Jacob Meyers, died.

All of which is contrary to the form, force and effect of the statute in such case in said State made and provided and against the peace and dignity of the State of Idaho.

That the said Rulon D. Hair on the 20th day of April, 1939, was brought before a committing Magistrate, to-wit: The Honorable William Hinck-

ley, Justice of Peace, Pocatello Precinct, Bannock County, State of Idaho, to be examined on the aforesaid charge, according to law: and was then and there by the said Magistrate advised of his statutory rights in the premises.

Thereupon, the said Rulon D. Hair was by the said Magistrate in open Court duly examined on the aforesaid charge according to law, and was then and there by the said Magistrate held to answer said charge in the District Court of the Fifth Judicial District, State of Idaho, within and for the County of Bannock.

C. M. JEFFERY

Prosecuting Attorney, Bannock County, Idaho.

State of Idaho, County of Bannock—ss.

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, do hereby certify that the foregoing is a true and correct copy of the original information filed in my office on the 19th day of May, 1939.

In Testimony Whereof, I have hereunto set my hand and official seal this, the 19th day of May, 1939.

..... Clerk.

..... Deputy.

Names of Witnesses known to Prosecuting Attorney at the time of the filing of this Information: Dr. H. H. Hughart, Ray Swallow, Don Robinson, F. H. Smullen, Arthur P. Hall, Y. D. Black, L. F. McKinnon, Robert M. Pugmire, A. R. Decker, Lee Bellah, Guy Nelson, Beth Robbins, Gretta Chambers, Anna Keefe, Art Olson, Edna Locke, L. W. Cox, Tom Rush, A. L. Oliver.

Filed in open District Court and made a record of said Court this 22 day of May, 1939.

ANNA KEEFE, Clerk.

C. M. JEFFERY, Prosecuting Atty.

[Title of State District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN, Foreman

[Endorsed]: Filed Dec. 3, 1939. [109]

[Title of State District Court and Cause:] B 1591.

Register No. B 1591

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant. Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal) (Sgd.) ANNA KEEFE, Clerk

Mr. Davis: Very well. I want to reoffer plaintiffs' exhibit 23 now which has been definitely identified as the Sunday Tribune Journal, published at Pocatello, Idaho, on Sunday, April 16, 1939, carrying the story or a news item concerning the death of Jacob Meyers, who was struck and killed by Rulon D. Hair, the article generally states that Mr. Hair was arrested and that he is charged with speeding and with being intoxicated,—I offer to prove by calling witnesses that it was the only local daily newspaper published in [395] Pocatello, at that time, and that it was the only newspaper published and placed on the news stands in Pocatello on Sunday, April 16, 1939. I do not offer it for the purpose of proving the facts therein set forth, but for the purpose of proving notice of the charges made against Hair at a time when Mr. Donnelly was in Pocatello, and at a time when Mr. Donnelly had been sent to Pocatello by his superior for the purpose of making a complete investigation and for the purpose of showing that it must have been the clipping that he sent to his superior. And regardless of whether it was or not, it charges him with notice. (Further argument.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It has never been identified as the one press notice sent to the Company by Mr. Donnelly. If it goes in and goes before the jury, they will read it and use it for all purposes and it becomes prejudicial. If counsel had wanted the one sent to the Company, the rules provide a simple method of procuring it. We don't know whether

this is the one that was sent in or not. At this time it becomes highly prejudicial and improper to permit its admission at this time.

The Court: It doesn't seem to me that sufficient foundation was laid to admit it. I take it [396] that the newspaper publication would stand in the same position that the Court record of the Dubois matter stood. That it would not be constructive notice of what it contained, unless it can be shown by more positive testimony than is now in the record that either Mr. Donnelly or someone connected with the Tobacco Company read this paper. Mr. Donnelly did not admit,—although I will admit that I was not very much impressed by his testimony in that regard,—and I am saying this in the absence of the jury,—He would not admit that this was the notice which he sent, the presumption is very strong that it was the notice or clipping. Unless you have some authority on the question of whether a newspaper,—a local publication, in the community in which the man resides or is at the time, is in any way notice to him of anything it contains, I think I will deny its admission at this time.

The record may show that this was reoffered and objected to and that the Court sustained the objection.

(Whereupon the Jury was called into the Court room.)

Mr. Davis: May I proceed.

The Court: Yes, you may go ahead.

Mr. Davis: Now, I am reading from the exhibits which have been admitted by the Court. First

I will read the caption of a complaint filed in another action, and [397] this is a portion of Exhibit "A" attached to the deposition of Mr. Darr which has been read here: "In The District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock. Bertha Myers, Jacob D. Myers, Mary Holly, Henry Myers, Ida Woods, Bertha Pieper, Evelyn Myers Hanson, Leona Weiland, George Myers, Robert Myers and Melba Dunn, Plaintiffs, vs. R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, Defendants. Complaint." Now I will read paragraph five of the complaint which appears on page 24 of the deposition of Mr. Darr: "That at all times hereinafter mentioned and particularly on the 15th day of April, 1939, between the hours of four and five o'clock in the morning of said day, the defendant Rulon D. Hair was an agent, servant and employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly; that in connection with the employment of the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company, it was part of the duties of the defendant Rulon D. Hair to operate and drive a certain motor vehicle, or truck, which said truck was a Chevrolet job delivery truck, and bearing Bannock County, Idaho, license number 3A-41; that it was at all times hereinafter mentioned and particularly on the 15th day of April, 1939, at the hour of between four and five [398] o'clock in the morning of said day, it was the duty of said defendant, Rulon D. Hair as such agent, servant or employee of the defendant L. R.

Donnelly and R. J. Reynolds Tobacco Company, to haul, transport and have in his possession in said motor vehicle a stock or quantity of goods consisting of cigars, cigarettes, and tobaccos produced and manufactured by the defendant R. J. Reynolds Tobacco Company, and for sale by the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, through and by the defendant Rulon D. Hair, it being the duty of said Rulon D. Hair to drive and operate said truck and to haul said stock of tobaccos, cigarettes, etc., in said truck from place to place in Bannock County, Idaho, and in other counties throughout the Southeastern portion of Idaho, said Bannock County, and other counties throughout the southeastern portion of Idaho being the territory allotted to the defendant, Rulon D. Hair, by the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company within which to solicit orders and canvass the trade generally; that it was further a part of said defendant Hair's duty, as an employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, to post and distribute advertising materials and matters, advertising the goods, wares, and merchandise manufactured by said Tobacco Company [399] and for sale by said defendant Donnelly and R. J. Reynolds Tobacco Company."

Now I am about to read from a letter which appears on page 36 of the deposition: "As soon as we arrived in Pocatello we called on Mr. Black, who is Mr. Hair's attorney. He rehearsed the accident to us right from his window as the street is in

plain view from his window.” That was dated April 28, 1939, and was written by Mr. Roe to the Reynolds Tobacco Company. Now I am about to read from page 37 of the deposition, this is a portion of the same letter: “In the late evening Mr. Donnelly and I invited Mr. and Mrs. Hair over to the hotel to talk things over. Found Mrs. Hair very pleasant and willing to cooperate with her husband in every way possible and assist him to the extent of placing her application with two of the stores, one of which she already had been working part time.

It certainly was understood between Mr. Hair and myself that at no time was he to use company car, only when on Company business 100%. Mr. Hair remarked he thoroughly understood these instructions which would be strictly adhered to. Mr. Hair said it wasn’t necessary for him to take company car out at such an hour in the morning as he could of used his personal car just as well, however, he thought as he would be getting [400] it out in about two hours anyway he would just use it in taking Mrs. Hair to the station. Of course, this turned out to be a bad thought on his part.”

Now, I will read from the bottom of page 38 of the deposition, a portion of the same letter: “Might also mention, all across Mr. Hair’s assignment today, I noticed a very good showing of outside advertising matter, in other words, I believe this salesman is trying to get places with the Company.”

Now, I will go back and read another paragraph of the Complaint which the Court said I would be

permitted to read, this is from page 30 of the deposition. "Wherefore, plaintiffs pray judgment against the defendants and each of them for damages, and for costs of suit and general relief. Anderson, Bowen & Anderson, Attorneys for plaintiffs. Residence, Pocatello, Idaho. Verified by Jacob D. Myers as one of the plaintiffs, before Clyde Bowen, Notary Public for Idaho, on June 14, 1939. Summons issued June 14, 1939."

In accordance with the ruling of the Court, I will not read exhibit 24 at this time.

The Court: Yes, but it was admitted.

Mr. Davis: The plaintiff rests.

The Court: I will excuse the jury at this time, and they may be excused until 2 o'clock, but they will not return to the Court room until called for by the Court. [401]

Mr. Merrill: I have a motion to make at this time.

Mr. Davis: First, Mr. Merrill, we have a witness here who is very anxious to get home and his evidence, if used at all, will be in rebuttal. It is very short and I was wondering if we could take it and let him go home and if used, it could be read by the Court reporter at the proper time with the same effect and subject to the same objections as if he was on the stand. And it could be put in the record at the proper place by the reporter.

Mr. Merrill: We can agree on that.

The Court: Very well, you may state your motion and we will hear your arguments later.

Mr. Merrill: Comes now the defendants Donnelly and R. J. Reynolds Tobacco Company, the

plaintiffs having rested and moves the Court for a judgment of nonsuit on that charge of the amended complaint contained in paragraph 7, reading as follows: "That at all times herein mentioned the said defendant Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company and L. R. Donnelly, to use and operate said Chevrolet panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly [402] knew that Rulon D. Hair was a careless, reckless, drunken and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions," and such other allegations as would be pertinent thereto. Upon the grounds and for the reasons that the evidence wholly and completely fails to warrant the case in going to the jury upon such grounds because:

1. There is no competent evidence proving that Hair was a reckless, drunken and incompetent driver, or

2. That there is no evidence that the defendants or either of them had any knowledge of any kind or character as to,—tending to prove or proving such a fact if it actually existed or really existed.

3. Upon the further ground that such evidence as was introduced touching the carelessness and recklessness if any existed in the so-called Myers incident was merely an incident and wholly insufficient upon which to predicate a verdict of the jury.

4. That the testimony of the witnesses called by the plaintiffs attempting to prove the reputation of

Hair to be bad was wholly insufficient to prove or tend to prove either that such existed or that the defendants or either of them knew or had knowledge of any kind or character thereof. [403]

5. Defendants further move for judgment of nonsuit upon the remaining allegations of the said complaint.

The Court: The Court will take the first motion under advisement until counsel can present it fully.

Mr. Merrill: Defendants move further for a judgment of nonsuit upon the entire complaint upon the grounds that the evidence is insufficient to justify a verdict of the jury thereon, more particularly in each and all of the particulars mentioned in the motion heretofore made for a nonsuit on the limited portion of the said complaint, and further upon the following grounds:

1. That there is no sufficient or competent evidence in the record to show that Rulon D. Hair was acting within the scope of his employment at the time of the accident, and injury to Avenel Newby, but on the contrary, the evidence clearly shows that he was violating the instructions of the Company and that he was on a party of his own and the evidence is insufficient to show any waiver of these instructions.

The Court: And that is also taken under advisement by the Court.

Mr. Merrill: Come now the defendants Donnelly and Reynolds Tobacco Company and in the event that the motions for nonsuit be denied or that the motions of nonsuit [404] or request that that portion of the action be taken from the jury which is con-

tained in paragraph seven of the amended complaint, moves the Court in such event that the plaintiff be required to elect upon which of said theories of their complaint they will rely for judgment. That is to say, whether they will rely upon the theory that Hair was acting within the scope of his employment when driving Avenel Newby as a guest or whether they will attempt to rely upon the theory that Hair was an incompetent, drunken and reckless driver and known as such to these defendants.

The Court: Now, I understand that counsel want to proceed with the case so that some of the witnesses who wish may be excused and this matter can be taken up later.

(The jury was recalled and the following proceedings had):

3:30 P. M. March 21, 1945

The Court: You may proceed.

CARL OXENBINE,

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name, please?

A. Carl Oxenbine. [405]

Q. Where do you live?

(Testimony of Carl Oxenbine.)

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Thirty-two years.

Q. What is your occupation?

A. Mechanic.

Q. Where are you working now?

A. The Bear Lake Motor Company.

Q. The Bear Lake Motor Company?

A. Yes, sir.

Q. Is that the Ford Garage?

A. That is the Ford Garage.

Q. Were you working there in September, 1942?

A. That is correct.

Q. Did you have occasion to go, with the wrecker, out to where a car was off the highway?

A. Yes, that's right.

Q. Between Montpelier and Soda Springs?

A. Yes, sir.

Q. Do you remember the date you went out there?

A. Not exactly.

Q. Who went out with you?

A. Mr. Hair and Cecil Thomas, an employee of the garage.

Q. Is that Mr. Hair, Rulon D. Hair?

A. Yes, sir. [406]

Q. What time of the day did you go out?

A. Shortly after six o'clock.

Q. In the evening?

A. Yes, sir.

Q. Did you observe the automobile after you got out there?

A. That's right.

(Testimony of Carl Oxenbine.)

Q. What, if anything, was the condition of the automobile?

A. It was upside down with the right front tire blown out.

Q. What is the fact as to the tubing on that tire?

A. The tubing of the tire was sticking out between the rim and the tire.

Q. How long an opening was there in the tire?

A. That I cannot say.

Q. What size tire was it? A. 600 x 16.

Q. Is that a baloon tire or not? A. No.

Q. Did you observe the right of way?

A. I noticed some tracks on the right side of the road?

Q. Where were these with reference to the oiled portion of the road or highway?

A. Right along the west side of the oil road on the shoulder.

Q. How long were the tracks?

A. I imagine about two hundred feet.

Q. What was the condition of the weather that day? A. It had been raining. [407]

Q. What was the condition of the shoulders of the right-of-way? A. Muddy.

Q. How deep was this track along on the west side of the oiled portion of the highway?

A. I would judge three and a half to four inches.

Q. How wide was it?

A. I would be unable to say for sure.

Q. Did you follow the track that you noticed out on the west side of the oil pavement that was on the

(Testimony of Carl Oxenbine.)

shoulder, and came over on the oiled portion of the road and then follow up to the car, to where it was upside down?

A. The only tracks I observed was the last track the car made off the oil in the mud after it took across the highway.

Q. You saw where it came out of the mud up on the oiled road and across the highway?

A. Yes, sir.

Q. Did that follow to where the car was upset?

A. Yes, sir, that went to where the car was turned over, that is right.

Q. Then the markings from the west side of the oiled pavement crossed the highway over the highway to the east?

A. That's right.

Q. How long did the track go along down on the west and on the oiled pavement?

A. Straight across the highway. [409]

Q. What direction was the car traveling?

A. South.

Q. Is that toward Montpelier or away from it?

A. Toward Montpelier.

Q. From Soda Springs?

A. Yes, sir.

Q. About where, with reference to Soda Springs did the accident occur?

A. Well I would say approximately ten miles from Soda Springs.

Q. About ten miles.

A. I would say approximately that.

Q. South?

A. South, yes, sir.

(Testimony of Carl Oxenbine.)

Q. What kind of a borrow-pit was there, if you remember?

A. I would say the borrow-pit was about three feet deep.

Q. Did you make any examination of the tire to determine what caused the blow-out?

A. I did not.

Mr. Merrill: That is all. You may examine.

Cross Examination

By Mr. Davis:

Q. You went out with Mr. Hair?

A. That's correct.

Q. What was the principal reason you went out?

A. To pick up this automobile.

Q. Can you see this plat? [409]

A. Yes, sir.

Q. Were you in the room when Mr. Bunderson testified from this plat? A. Yes, sir.

Q. Calling your attention to what is marked "car" here, show the jury the part of the track that you saw there?

A. I have to find out which way is north and south.

Q. This is north and this is south (indicating).

A. I observed the tracks that came on this side, this sixty-six feet. That is the track that I observed, this went across the road here.

Q. You didn't go back up the road and follow the tracks? A. No, sir.

(Testimony of Carl Oxenbine.)

Q. Did Hair ask you to? A. No, sir.

Q. Did he say anything to you about going up the highway and looking for the rock that caused the blow-out of the tire? A. No, sir.

Q. You say this depression in the shoulder of the road was three and a half or four inches in the mud? A. Yes, sir.

Q. Would it be the same off here (indicating).

A. I didn't see any tracks on the opposite side.

Q. When it left the oiled road did it cut three and a half or four inches down here? [410]

A. I never noticed.

Q. Where it cut down three or four inches was it on the shoulder or off the shoulder?

A. On the edge of the oiled road.

Q. Do you express any opinion as to whether there was a tire flat at any place where you noticed the roadway? A. I couldn't say.

Q. Mr. Oxenbine did you have anything to do with fixing that tire? A. No, sir.

Q. Or the tube? A. No, sir.

Q. Do you know whether it was repaired or not?

A. No, sir.

Q. Do you know whether another tire and tube was put on before the truck left the garage?

A. I think there was a spare put on.

Q. Is it a part of your business to fix or repair tires and tubes?

A. They do fix tires and tubes, but I have nothing to do with that part of the business.

Q. Have you had considerable experience,—how

(Testimony of Carl Oxenbine.)

much experience have you had as a mechanic in making examinations of blown out tires?

A. Very little. That comes under a different man. [411]

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill:

Q. What kind of a roadway,—what kind of side-line or edge was these on the oiled pavement along here, was it sharp and ragged, or did you observe that?

A. From glancing at it I would say it was wavy from where the heavy traffic had caved off the edge.

Q. You say you didn't look back beyond that point?

A. No, sir, I didn't.

Q. You don't know about the markings along the highway?

A. Absolutely not.

Q. Do you know whether there were markings along the center of the highway?

A. The only ones I saw was across the highway.

Q. Do you know whether there was a yellow or white line on the highway?

A. I couldn't say.

Q. Did you observe or examine the remaining tires on that car?

A. No, sir.

Mr. Merrill: I think that's all.

Mr. Davis: That's all.

JACK PERKINS,

being called as a witness on the part of the defendants after being duly sworn, testifies as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name?

A. Jack Perkins.

Q. Where do you reside? A. Montpelier.

Q. What is your business or occupation?

A. I operate an apartment house.

Q. What is the name of the apartment house?

A. The Downing Apartments.

Q. Were you engaged in that business during September of 1942? A. Yes, sir.

Q. Including September 11th, of that year?

A. Yes, sir.

Q. How long had you been engaged in the operation of that apartment house before September 11, 1942?

A. The exact date, I can't say.

Q. Would you say that it would be a year or a year and a half? A. Yes, sir.

Q. Were you acquainted with one Avenel Newby? A. Yes, sir.

Q. On September 11,—during the early part of September and up to the 11th of September, 1942, state where she was living, if you know?

A. What was the question? [413]

Q. Where was Avenel Newby living in Montpelier that month prior to September 11, 1942?

(Testimony of Jack Perkins.)

A. In my apartment.

Q. How long had she lived there prior to September 11, 1942?

A. How long had she lived there?

Q. Yes. Would you say a month or a few months. Would you say it was more than a month?

A. A month or less.

Q. Isn't it a fact that you served notice——

Mr. Davis: Now I shall object to that question before it goes any further, as leading, counsel is making a statement.

Q. Now with reference to any notice to vacate with reference to Mrs. Newby, will you state what if anything you did in that regard?

A. Yes, sir.

Q. What did you do?

A. I had complaints from several people.

Mr. Davis: We object to this. Is not responsive. He can state what he did do.

The Court: That is the only question.

A. Yes, sir. I served notice to vacate.

Q. When did you serve the notice to vacate upon the Newbys?

A. As I recall it was either a day or two before the accident.

Q. State briefly why you served such a notice to vacate? [414]

Mr. Davis: We object to the question of why. It is incompetent, irrelevant and immaterial, and the notice would be the best evidence.

The Court: Sustained.

(Testimony of Jack Perkins.)

Q. State whether or not you had complaints from other tenants with reference to the Newby Apartments?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

The Court: It would also be hearsay, sustained.

Q. Now, Mr. Perkins, how many apartments were in that apartment house?

A. Twelve.

Q. Were those apartments occupied, and kept full of people at that time?

A. Yes, sir, at that time.

Q. What is the character of that apartment house business so far as conducting it quietly and peaceful and respectable?

A. It is good.

Q. With reference to the conduct of your apartment house did anything occur which led you to serve this notice to vacate on the Newbys. If so, state what?

Mr. Davis: Just a moment,—no, I have no objection, he can answer that by a yes or no answer.

A. Yes. [415]

Q. State what that was?

Mr. Davis: Was this what someone said to you?

A. Yes, sir.

Mr. Davis: Objected to as hearsay.

The Court: Sustained.

Mr. Merrill: I am trying to bring out that this

(Testimony of Jack Perkins.)

man is engaged in a particular business, and that anything that comes to him having to do with this notice is not hearsay, it goes to the question of giving notice in line of the business which he is conducting——

The Court: If this is a question of the reason for vacating this apartment, of having Mr. and Mrs. Newby vacate this apartment, I think he would be confined to his own knowledge and not what someone else told him.

Mr. Merrill: Mr. Newby testified that he knew that the notice was there at the apartment on Sunday after the accident. It came to his knowledge after he arrived home. We want to show why that notice was given by this man. He testified that he gave it prior to the accident.

The Court: The Court has ruled. The ruling will stand.

Q. What is the fact as to whether you had complaint as to Mrs. Newby's conduct, from the other tenants?

Mr. Davis: Objected to as incompetent, [416] irrelevant and immaterial. It has nothing to do with the notice served. It has only to do with complaints from other tenants and would be hearsay and is entirely prejudicial.

May I ask if they are attempting to attack Mrs. Newby's character here.

The Court: The objection is sustained. He may testify to what he knows of his own knowledge why he served this notice.

(Testimony of Jack Perkins.)

Q. Why did you serve notice to vacate.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: The Court has ruled that he may testify as to his own knowledge and not hearsay.

Mr. Davis: May I ask a question?

The Court: Yes, you may ask.

Mr. Davis: Mr. Perkins, isn't it a fact that whatever you did was because of what someone else said to you. Some complaint that someone else made.

A. Yes, sir.

Mr. Davis: We renew our objection.

The Court: Sustained.

Q. Did you know of your own knowledge whether there were disturbing parties in the Newby apartment?

A. No, not of my own knowledge, no. [417]

Mr. Merrill: That is all.

Mr. Davis: That is all.

CHARLIE NICHOLS,

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. What is your name?

A. Charlie Nichols.

(Testimony of Charlie Nichols.)

Q. Where do you live? A. Soda Springs.

Q. Where in Soda Springs do you live?

A. The Enders Hotel.

Q. How long have you been living there?

A. I don't know.

Q. Were you living there in September, 1942?

A. Yes, sir.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. Did you know him about the 11th—the 10th or 11th of September, 1942?

A. I did know him, yes, sir.

Q. Did he come,—at that time did you have anything to do with the Enders Hotel, either day or night?

A. Yes, sir. [418]

Q. What did you have to do with that hotel?

A. Clerk.

Q. Was there any other clerk at night, other than yourself, who looked after the business there?

A. No, sir.

Q. Did Mr. Hair come to the hotel in the evening or early morning of September 10th or 11th, 1942?

A. I can't remember that far back.

Q. Do you remember him coming to the hotel one night?

A. Yes, sir.

Q. About that time? A. Yes, sir.

Q. Was he alone?

A. He had a woman with him.

Q. What did he do?

A. Registered.

(Testimony of Charlie Nichols.)

Q. What did he do then?

A. Went to his room.

Q. Did the woman go with him?

A. Yes, sir.

Q. Have you been able to find the register sheets of that night?

A. No, sir, I can't do it.

Q. Then you haven't them?

A. No, sir.

Q. Is the registry sheet missing? [419]

A. Yes, sir, can't find it.

Q. Do you remember what the woman looked like?

A. No, sir,—no.

Q. They went upstairs?

A. Yes, sir.

Q. What time did you get off work?

A. About ten the next day.

Q. Did you see Mr. Hair any more the next day?

A. No, sir.

Q. Do you remember the accident that happened with Mr. Hair down there between Soda Springs and Montpelier?

A. No, I don't know a thing about it.

Q. Don't you recall the accident that happened on the highway? Did you hear about it later?

A. Yes, sir, I heard later.

Q. Was the time they came to the hotel and registered about the time of that accident?

A. I suppose it was, yes, sir.

Q. Do you know whether it was the day or night preceding the accident?

A. I couldn't say.

Q. You can't remember exactly?

A. I can't remember.

(Testimony of Charlie Nichols.)

Q. But you remember Hair coming in with a woman?
A. Yes, sir. [420]

Q. And registering?
A. Yes, sir.

Mr. Merrill: You may examine.

Cross Examination

By Mr. Davis:

Q. You don't have any idea what date that was?

A. No, sir.

Q. You don't know what date this accident happened?
A. No, sir.

Q. You don't know whether Hair came there in 1941 or 1942?
A. No, indeed, I don't.

Q. How many times did Hair come there and registered?

A. He has been coming and registering quite a while.

Q. Did he ever have a woman with him before?

A. No, sir.

Q. You don't know whether it was his wife or not?
A. I couldn't say.

Q. Did he register as man and wife?

A. I don't remember.

Q. And you don't know what date it was?

A. No, sir.

Q. You don't know who the woman was?

A. No, sir.

Q. You don't know what she looked like?

A. No, sir.

Q. What became of the hotel register? [421]

(Testimony of Charlie Nichols.)

A. Your guess is as good as mine?

Q. Have you other sheets on it?

A. The only thing I got is the 8th in 1928,—no, not 1928, the last report we have of him being there is on September 8th.

Q. What year? A. 1942.

Q. Does it show that Mr. Hair is registered on that? Registered on that date and on that sheet?

A. Sure.

Q. You haven't any other registry sheet?

A. No, sir.

Q. Do you keep them?

A. I couldn't find any more.

Q. And you couldn't find any place where Hair was registered after September 8th?

A. No, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill:

Q. He registered there quite frequently before that time? A. Yes, sir.

Mr. Merrill: That is all.

Mr. Davis: Nothing further.

The Court: We will recess until 10 o'clock in the morning. [422]

10 O'clock A. M., March 22, 1945

RULON D. HAIR,

called as a witness on the part of the defendants, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name, please.

A. Rulon D. Hair.

Q. Where are you living?

A. Salt Lake City, Utah.

Q. How long have you lived in Salt Lake City?

A. I have lived there off and on for fourteen years.

Q. Where were you born?

A. Midway, Utah, and I lived in Provo.

Q. You mentioned Provo. Did you ever live there?

A. I lived there in 1929.

Q. What is your occupation?

A. At present I am a baker.

Q. How long have you been engaged in that business?

A. About eight months.

Q. Prior to that time what was your occupation?

A. I was trucking.

Q. Did you ever live in Pocatello?

A. Yes, sir.

Q. When did you live here?

A. As near as I remember, from February, 1938, until the [423] later part of September, 1942.

(Testimony of Rulon D. Hair.)

Q. Did you ever work for the R. J. Reynolds Tobacco Company? A. Yes, sir.

Q. When did you commence working for this Company? A. In July, 1937.

Q. Do you know Mr. L. R. Donnelly?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. Some time prior to July, 1937, I cannot say just how long before it was.

Q. Were you working for the R. J. Reynolds Tobacco Company on the 10th day of September, 1942? A. Yes, sir.

Q. What were your duties?

A. To call on dealers and jobbers and place advertising matter and do consumer work.

Q. Did you have in your possession a truck owned by the R. J. Reynolds Tobacco Company?

A. Yes, sir.

Q. What kind of a truck was it?

A. 1941 Chevrolet sedan delivery.

Q. Under what condition was that truck delivered to you?

A. That I would use it for Company business.

Q. Did you have any right to use it for any other business than Company business?

A. No, sir. [424]

Q. At the time the truck was delivered to you was there any written agreement that you entered into? A. Yes, sir.

Q. I hand you what has been marked as defendant's exhibit 17 and I will ask you if you recog-

(Testimony of Rulon D. Hair.)

nize that? A. Yes, sir.

Q. What is it?

A. An agreement that I signed when this particular truck was delivered to me.

Q. Did you sign that agreement at that time?

A. Yes, sir.

Q. Does that contain anything touching hauling anybody other than employees of the Company?

A. No, sir.

Q. Read the last line. Now as to whether or not it contains anything as to hauling guests, what have you to say?

A. It says: "I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car."

Q. I hand you what has been marked as defendant's exhibit 20 and ask you if you ever received that statement? A. Yes, sir, I have.

Q. Were you in the employ of this Company, driving a truck at that time? [425]

A. Yes, sir.

Q. What if anything is said there with reference to driving the truck with anyone in it riding with you?

Mr. Davis: The reason I wanted to see it I think you said exhibit 20 and it is exhibit 26, and it is not being admitted in evidence. I have no objection to it being admitted and I think it should be before the witness is interrogated about it.

Q. Yes, that's right, now, Mr. Hair, did you get that exhibit from the Company?

(Testimony of Rulon D. Hair.)

A. Yes, sir.

Q. At the time you were working for the Company?

A. Yes, sir.

Mr. Merrill: We offer it in evidence.

The Court: It may be admitted.

DEFENDANT'S EXHIBIT No. 26

Admitted Mar. 22, 1945

Directors

S. Clay Williams
Chairman Board of Directors

Jas. A. Gray
President

R. E. Lasater
Vice President

J. W. Glenn
Vice President

John C. Whitaker
Vice President

M. E. Motsinger
Secretary

Directors

W. N. Reynolds
Chairman Executive Committee

R. C. Haberkern
Purchasing Agent
L. F. Owen
Traffic Manager

H. S. Stokes
Supt. Leaf Processing

P. Frank Hanes
Counsel

E. A. Darr
Mgr. Sales Dept.

R. J. Reynolds Tobacco Company

Winston-Salem, N. C.

November 4, 1937

S-22-C-C

To Our Salesmen Operating Automobiles:

We are sending you herewith accident report blanks. In case of accident, make out report of ac-

(Testimony of Rulon D. Hair.)

cident in triplicate, and send all three copies to your Division Manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employe of the Company.

R. J. REYNOLDS TOBACCO
COMPANY.

Defts. Exhibit 2—9/30/43 Reg—

1196—Defendant's Exhibit No. 20. Admitted Oct 22 1943

“I'd walk a mile for a Camel.” [112]

Q. Now, Mr. Hair, I will ask you, does that contain any directions touching the hauling of guests? A. Yes, sir.

Q. What does it say?

A. “You must not carry other passengers with

(Testimony of Rulon D. Hair.)

you when using the car, except your division manager or an employee of the company.”

Q. You understood that? A. Yes, sir.

Q. Did you get other similar bulletins or statements containing such language? [426]

A. From time to time.

Q. They came to you? A. Yes, sir.

Q. Did you ever make reply to them, touching that matter?

A. If reply was requested I did.

Q. I hand you letter,—defendant’s exhibit 19, is that in your hand writing? A. Yes, sir.

Q. What did you do with that letter after you wrote it?

A. I mailed one copy to the North Carolina office and one to the Salt Lake City office.

Q. Is that the original or a copy?

A. This is the original.

Q. Does that contain any statement by you touching the hauling of guests?

A. Yes, sir.

Q. What is that statement?

A. That I should never carry any passengers outside of my division manager.

Q. Now, Mr. Hair, there has been some testimony introduced in this case touching an accident that you had in April, 1939, in which it was asserted that you had taken your wife to the depot and had a man by the name of Eckersley in the car. Did you have any conversation with any of your

(Testimony of Rulon D. Hair.)

superiors of this Company following that accident touching the hauling of guests? [427]

A. Yes, sir.

Q. Where did that occur?

A. The Whitman Hotel.

Q. Who was that with?

A. Mr. L. R. Donnelly and Mr. Roe.

Q. What did they say to you about hauling guests?

A. They covered it thoroughly, that I was to understand that no more guests were to be hauled.

Q. What did they say touching your employment, if that was not understood?

A. They said if I was ever found to have a guest in the car again I would be immediately dismissed.

Q. You understood that thoroughly?

A. Yes, sir.

Q. Did you make reports to the Company?

A. Yes, sir.

Q. Periodical reports.

A. I turned them in every working day.

Q. Did you ever make a report of having hauled a guest in any company car at any time?

Mr. Davis: That is objected to, as the report would be the best evidence.

The Court: He may answer.

A. No, sir.

Q. There has been some evidence introduced that you had a guest in your car at Dubois at one time; when was that, [428] if it was so. I will with-

(Testimony of Rulon D. Hair.)

draw that. Let me ask that again. There has been some evidence introduced in which it was asserted that you were seen in Dubois, Idaho, with someone else in the panel truck. Do you know whether or not that is a fact?

A. Yes, sir; it was.

Q. When did that occur?

A. I cannot be sure, but it was in 1939 some time.

Q. Did you ever make a report of that to the Company? A. No, sir.

Q. State whether that was an isolated incident? A. I don't understand.

Q. State whether it was a single incident or whether it was your custom?

A. It wasn't my custom, however, it wasn't isolated.

Q. Did you ever do that before or after?

A. Yes, sir.

Q. How many times?

A. Several times.

Q. Who was the women you had in your car at Dubois? A. At which time?

Q. The time you mentioned.

A. A dealer of mine at Idaho Falls.

Q. An employee of the Company?

A. No, sir. [429]

Q. Did you ever report that to the Company?

A. No, sir.

Q. Did they ever find it out?

(Testimony of Rulon D. Hair.)

A. No, sir,—you mean did the company find it out?

Q. Yes, did your company ever find that out?

A. No, sir.

Q. Did Mr. Donnelly ever find that out?

A. No, sir.

Q. You understood that you would be fired immediately if they did? A. Yes, sir.

Q. Something has been mentioned here about Pond's resort. A. Yes, sir.

Q. Did you ever go up there?

A. Yes, sir, I did.

Q. Was that in your private car or in the Company truck?

A. We were vacationing in my private car.

Q. How far is Dubois from Pocatello?

A. Around a hundred miles.

Q. How far is Pocatello from Salt Lake City?

A. Around 184 miles, or 183 miles.

Q. Now, Mr. Hair, did you know Avenel Newby?

A. Yes, sir.

Q. When did you first become acquainted with her?

A. It was around August the 10th, or somewhere around there. [430]

Q. What year? A. 1942.

Q. Did you know her then, prior to September 10, 1942?

A. That was prior to September 10, yes, sir.

Q. How long had you known her prior to September 10th, 1942?

(Testimony of Rulon D. Hair.)

A. I met her that one time, that was about a month prior to September 10.

Q. Did you meet her on September 10, 1942?

A. Yes, sir.

Q. Where did she live?

A. I don't know.

Q. Do you know the town in which she was living at that time?

A. Montpelier, Idaho.

Q. Where did you meet her on September 10, 1942?

A. In front of the Idaho Billiards at Montpelier.

Q. On the street?

A. Yes, sir.

Q. What was the occasion of that meeting?

A. I had completed calling on the Idaho Billiards and was crossing the sidewalk to cross the street to where my car was. Mrs. Newby came down there with her small daughter, as I remember and pushing a baby carriage.

Q. What was said and by whom? Was there anyone else there at that conversation besides you and Mrs. Newby?

A. Her daughter. [431]

Q. Yes, the children, but was there any other grown person?

A. No, sir.

Q. What was said and by whom?

A. I didn't recognize her right at first but we spoke and she recalled having met me at the Aero Club a month previous.

Q. Did she say anything about a date?

A. Yes.

Q. What did she say about a date, at that time?

(Testimony of Rulon D. Hair.)

A. I made the remark that I was going to the Aero Club again that evening for dinner and she said, "Fine, how about going along?"

Q. What did you say?

A. I told her there were two other gentlemen going with me and I didn't know what they would think about it.

Q. And what did she say to that?

A. I don't recall what she said to that.

Q. Did she make any other comment about the evening's entertainment?

A. I told her I had reports to make out and a few other things to do and that I would see the reaction of these other fellows.

Q. What else was said, if anything?

A. I don't recall,—I don't recall that anything was at that time.

Q. Did she say anything about dancing? [432]

A. Yes, sir.

Q. What was said?

A. She said she had been up to the Club two or three nights before but hadn't had a very good time and she would like to go up with us and dance.

Q. Do you recall anything else in that conversation at that time?

A. There was a conversation but I don't recall it.

Q. Where was the Aero Club from Montpelier?

A. About five or six miles.

Q. From Montpelier?

A. Yes, up the canyon.

(Testimony of Rulon D. Hair.)

Q. And what kind of a club was it? What did they serve and so forth?

A. It was a general restaurant and a bar downstairs and private rooms upstairs.

Q. Did you say how far it was from Montpelier?

A. Yes, sir; five or six miles.

Q. Up in the mountains?

A. On the Geneva highway.

Q. Now about the conversation on the street in Montpelier, did you hear from her again later on that day?

A. Yes, sir; she called me on the phone.

Q. What time did she call you on the telephone?

A. It was somewhere between seven and nine o'clock. [433]

Q. Where were you at that time?

A. In my cabin.

Q. What cabins were they?

A. The Burgoyne cabins, in Montpelier.

Q. Had you made arrangement to stay there that night?

A. Yes, sir.

Q. Was there any arrangement to stay with anyone there?

A. Yes, sir, I had an adjoining cabin with a salesman friend.

Q. Was there a telephone in your cabin?

A. No, sir.

Q. Who called you to the telephone?

A. One of the employees of the cabins.

Q. Do you know his name?

A. I didn't know at that time.

(Testimony of Rulon D. Hair.)

Q. Do you now?

A. I think it was Perkins.

Q. Was he a young man or an old fellow?

A. A young fellow.

Q. What did you do when he told you you were wanted on the telephone?

A. I answered it.

Q. Who was on the telephone?

A. Mrs. Newby.

Q. What was that conversation?

A. She asked if we were still going to the club. I wouldn't try to relate the exact words, but she asked if we had [434] finished with the reports. I had said that we had reports to make out.

Q. What did you say to her?

A. I don't recall the exact words, but I told her that we were about through with the reports.

Q. What was said about supper?

A. I don't recall saying anything.

Q. You said in the conversation on the street that you were going to the club for supper; did you do so?

A. No, sir.

Q. What did you do?

A. We changed our plans and went to the Burgoyne Cafe and ate.

Q. Had you had supper at the time she called on the telephone?

A. I don't recall.

Q. Do you remember what was said in the telephone conversation about going to the Aero Club, —what was said on the telephone?

A. I don't recall the exact words but I told her

(Testimony of Rulon D. Hair.)

it was all right to go along with us. I forget whether I told her that we were going to eat down town or had eaten down town.

Q. Was anything said about the hour she would be picked up?

A. No specific time, but I told her to come up to the cabins; that we would probably be back from dinner at that time. If I told her about dinner, I don't recall just what the conversation was. [435]

Q. Did she say she would come up or not?

A. She said she would.

Q. Did you see her later that evening?

A. She was approaching the cabin.

Q. Walking or riding?

A. Walking, as we were coming from the cabin she was between the service station and the cabin.

Q. What was said when you got within talking distance of her?

A. I don't recall anything particular.

Q. What was done, if anything?

A. She went to the cabin and I introduced her to these two gentlemen.

Q. Did she go to your rooms? A. Yes, sir.

Q. Did she leave anything there?

A. Her hat, as it was quite large, she said it would interfere with her dancing.

Q. What did you do then?

A. Mr. Rasmussen, this other salesman and myself went to the Club.

Q. Who else? A. Mrs. Newby.

Q. How did you go? A. This Camel car.

(Testimony of Rulon D. Hair.)

Q. You knew that it was a violation of the rules of the company? A. Yes, sir.

Q. You knew that you would be fired if they knew of it? A. Yes, sir.

Q. What time did you leave for the Aero Club?

A. About nine-thirty or ten o'clock.

Q. In the evening? A. Yes, sir.

Q. What evening was that?

A. Thursday evening, September 10.

Q. The evening preceding the accident that happened the next afternoon about 4:30 P.M.

A. Yes, sir.

Q. When you went to the Aero Club, what did you do?

A. Just danced and amused ourselves the best we could.

Q. Did you eat?

A. Not that I recall; we had eaten in town.

Q. Did she have any refreshments?

A. Yes, sir.

Q. What kinds? A. Mixed drinks.

Q. Did she buy them or did you buy them?

A. I bought two and I don't recall any other she had.

Q. Did she drink them? A. Yes, sir. [437]

Q. Did you have some?

A. I drank two with her.

Q. Did she dance with other people?

A. Yes, sir.

Q. She was in the companionship of other sales-

(Testimony of Rulon D. Hair.)

A. Yes, she just mixed around.

Q. Do you know whether she was drinking with others? A. I don't know.

Q. How long did you stay there?

A. We stayed there until after the place closed; I don't know how long after.

Q. What time did it close. Did they have the twelve o'clock curfew hour in those days?

A. I am not sure but I think it was about two o'clock when they usually closed.

Q. In the morning,—two in the morning?

A. Yes, sir.

Q. Did the men who went up with you come back with you from the club? A. No, sir.

Q. How did they come back, if you know?

A. I don't remember how they came back.

Q. Did they make any comment to you about going back? A. I don't recall. [438]

Q. Why didn't you go back together?

A. I don't remember.

Q. Do you remember whether she wanted to dance more? A. No, I don't at this time.

Q. Then you left about when the place closed, about two or two-thirty in the morning?

A. We stayed a short time after they closed.

Q. All the other patrons had gone home?

A. No, there were a few people around there.

Q. After they closed what did you do?

A. Drove back to Montpelier.

Q. Were you alone with her on the way back?

A. Yes, sir, the two of us.

(Testimony of Rulon D. Hair.)

Q. On the way back to Montpelier, you and her?

A. Yes, sir.

Q. What did you do when you got to Montpelier?

A. I stopped directly across from the Burgoyne cabins.

Q. Why did you stop there?

A. She had left her hat and I asked if I should go and get it.

Q. What did she say?

A. She said why get the hat, let's go over to the Oasis Club and dance some more.

Q. Where was the Oasis Club?

A. Soda Springs.

Q. What did you say to that? [439]

A. That I had work to do the next day and I shouldn't go to Soda Springs.

Q. What did she say?

A. There was some talk back and forth.

Q. Was anything said about taking her home then,—anything said by you?

A. Yes, I mentioned taking her home when I mentioned going for her hat, and she said something about she wasn't ready to go home, and to let's go and dance some more.

Q. What else was said, if you remember?

A. I finally consented to take her to Soda Springs.

Q. That was about what time in the morning of September 11th?

(Testimony of Rulon D. Hair.)

A. I should judge around three o'clock or three-thirty.

Q. Then did you leave for Soda Springs?

A. Yes, sir.

Q. Relate what happened then?

A. Well, when we arrived in Soda Springs the Oasis Club was already closed.

Q. How fast did you drive going to Soda Springs?

A. I took my time, I don't know how fast I drove.

Q. Where was the Oasis Club with reference to the Enders Hotel in Soda Springs?

A. It is down in the next block, if they have blocks there.

Q. How far from the Enders Hotel?

A. About one city block.

Q. Did you both get out and go to the Club?

A. The club was closed?

Q. Could you see that from the truck in which you were sitting out in the street?

A. Yes, sir. The lights were out and it was closed up.

Q. Then what did you do?

A. We went to the hotel. I told her that I was exhausted and didn't feel capable of driving back and I suggested that we get some sleep.

Q. What hotel did you go to?

A. The Enders.

Q. Where did you park your car when you went to the Enders Hotel?

(Testimony of Rulon D. Hair.)

A. Close to the hotel, in front.

Q. Did the two of you go to the Enders Hotel?

A. Yes, sir.

Q. Who did you see there?

A. Just the night clerk?

Q. Who was he? A. They call him Jiggs.

Q. Was he the man who testified here yesterday?
A. Yes, sir.

Q. Charles Nichols? A. Yes, sir.

Q. Was anybody else there at that time?

A. No, not that I recall. [441]

Q. Do you remember how you registered?

A. I imagine as I usually do, I don't recall.

Q. Was she with you at that time?

A. Yes, sir.

Q. Standing by you? A. Yes, sir.

Q. Do you remember whether you registered as man and wife or just for yourself?

A. I don't remember.

Q. Did you take one room or did you take two?

A. I suggested two, but we decided that we didn't need two, we were just going to rest.

Q. Did the two of you go to the room?

A. Yes, sir.

Q. And went into the room? A. Yes, sir.

Q. That was about what time in the morning?

A. I should judge around four-thirty or five o'clock in the morning.

Q. How long did the two of you remain in that room?

A. It was around eleven-thirty or twelve o'clock.

(Testimony of Rulon D. Hair.)

Q. The next day at 11 or 12?

A. Yes, sir.

Q. That would be the same day, or the 12th of September? A. September 11th.

Q. You got to the hotel about five or five-thirty?

A. About four-thirty or five.

Q. On the 11th? A. Yes, sir.

Q. In the morning? A. Yes, sir.

Q. And you occupied that room and stayed there until about noon of that day?

A. Yes, sir.

Q. The two of you remained in that room all of that time? A. Yes, sir.

Q. There was a bed there? A. Yes, sir.

Q. Did anyone call at the room while you were there? A. Yes, they did.

Q. Who called? A. Mr. Rasmussen.

Q. About what time did he call?

A. About eleven or eleven-thirty.

Q. Did he come into the room?

A. No, sir, he didn't come into the room. He came to the door.

Q. Did you go out in the hall or did you talk to him at the door of the room?

A. I opened the door of the room and talked to him.

Q. Did he see Mrs. Newby? A. Yes, sir.

Q. What was said, if anything, between you and Mr. Rasmussen?

A. He asked when I was going home as I recall.

(Testimony of Rulon D. Hair.)

Q. Did he say anything about why you were there?

A. I don't remember anything said about that.

Q. Did he say anything about why you didn't stay at the cabin camp at Montpelier in the room that you had adjoining him?

A. He said something but I don't remember what it was.

Q. Did you say you were going to take Mrs. Newby back to Montpelier? A. Yes, sir.

Q. Did you say anything to him about sending any message to your wife?

A. He told her that I would be a little later than him in getting home?

Q. What business was Mr. Rasmussen engaged in?

A. The same business as I was only for a different company.

Q. How long did Mr. Rasmussen stay there?

A. Not very long.

Q. What time was he there?

A. Around eleven o'clock in the morning.

Q. After Mr. Rasmussen left what did you do?

A. We went down to the Oasis Club.

Q. Was it open then?

A. The Oasis Cafe and Club is a combination and we went down to have lunch. [444]

Q. And then what did you do, when you left the hotel?

A. We went into the front,—the front part is a cafe and the back is a bar and recreation room. We went into the cage and after lunch Mrs. Newby

(Testimony of Rulon D. Hair.)

suggested that we have another drink, which we did.

Q. How many drinks did you have there?

A. One that I recall.

Q. Might there have been more?

A. There could have been.

Q. What kind of drink was it?

A. A mixed drink.

Q. What do you mean by mixed drink?

A. Mixed drink,—whiskey and whatever you have as a mixer.

Q. It is an alcoholic drink? A. Yes, sir.

Q. How long did you dance there? Did you dance at that time?

A. We danced about, oh, just a little while and played the slot machines around there and visited with whoever came in until it was in the afternoon, I judge it was about two or two-thirty.

Q. What did you do then?

A. We went out and got into the car and I kind of looked up and down the street to see if Mr. Rasmussen had left town and he had and I thought I would drive to Grace and see if I could get to see him and have him tell my wife I [445] would be late getting home that night.

Q. Did you drive to Grace? A. Yes, sir.

Q. What direction is that from Soda Springs?

A. Southwest.

Q. And how far?

A. About six miles, I guess.

Q. How long were you there at Grace?

(Testimony of Rulon D. Hair.)

A. Just long enough to turn around and go back.

Q. Did you see Mr. Rasmussen?

A. No, sir.

Q. Did you transact any business for the defendants at Grace on this trip? A. No, sir.

Q. Did you transact any business for the defendants at Soda Springs? A. No, sir.

Q. Your entire attention was given to this lady?

A. Yes, sir.

Q. What did you do after you left Grace?

A. Started to Montpelier.

Q. You came back to Soda Springs?

A. Touched at the outskirts of the town.

Q. What was your objective?

A. To take Mrs. Newby home and get my baggage.

Q. And you drove to Montpelier? [446]

A. Yes, sir.

Q. Your first objective was to take Mrs. Newby home? A. Yes, sir.

Q. What kind of a day was it?

A. Cloudy and rainy.

Q. Which direction did you travel on the highway going to Montpelier, do you remember the direction? A. In a southerly direction.

Q. How far is Montpelier from Soda Springs?

A. About thirty-one miles.

Q. On your trip from Soda Springs back to Montpelier where was Mrs. Newby sitting in the truck?

(Testimony of Rulon D. Hair.)

A. In the passenger side of the car.

Q. By the side of you? A. Yes, sir.

Q. What is the fact as to whether or not she was a guest or a paying passenger?

A. She wasn't paying.

Q. She just went along with you?

A. Yes sir.

Q. At her request,—is that a fact?

A. Yes, sir.

Q. Did anything happen en route, on your way back to Montpelier, did anything happen along the road? A. There was something happened.

Q. Relate now exactly what happened,—no, I will withdraw that,—Who was driving along the highway on the way back to Montpelier, you or Mrs. Newby? A. I was driving.

Q. Relate what happened on this trip when you were taking Mrs. Newby back home?

A. I met a large green semi-trailer truck.

Q. How wide was it?

A. I didn't measure it.

Q. Could you give me an estimate?

A. They generally run seven and a half or eight feet.

Q. Where did you meet this semi-trailer truck?

A. It was about twelve miles south of Soda Springs as I recall it now.

Q. Before meeting this semi-trailer did you pass any other car going in either direction?

A. Yes, sir.

Q. Where did you pass one?

(Testimony of Rulon D. Hair.)

A. I didn't remember exactly at that time but since I have learned where I passed it.

Q. Do you know now where you passed it?

A. I know now, yes, sir.

Q. Where?

A. Just south of the overpass about two miles south of Soda Springs.

Q. How fast were you driving along the highway that day? [448]

A. About thirty-five or forty miles an hour, I would judge.

Q. When you met this semi-trailer what happened?

A. As I approached it, it was riding a little over the yellow line.

Q. That would be to the west, on your side?

A. Yes, sir, he was coming north.

Q. What happened to you?

A. To give him plenty of room I threw my two right wheels on the shoulder.

Q. How did you find the shoulder?

A. It was very soft from the rain.

Q. What happened then?

A. It threw my car out of control and it seemed that the tire blowed out. I struck a rock or a sharp object and that threw it completely out of control.

Q. What kind of highway was it at that point?

A. Smooth.

Q. Was it up and down?

A. Well, it was rolling.

(Testimony of Rulon D. Hair.)

Q. What did you do when the car went out of control?

A. I tried to control it. A panel truck like that, when it is loaded in the back end and hits a soft shoulder it causes it to swerve back and forth and I spent all the time trying to keep it on the road.

Q. How long a distance did you travel when you went out on the shoulder before the car came to a stop? [449]

A. I don't know.

Q. Did you swerve back and forth across the highway more than once?

A. I wasn't interested in counting them.

Q. Where did you,—where did the car come to to a stop?

A. On the east side of the highway.

Q. How fast were you driving when you passed this truck and up to the time it came to a stop, if you know?

A. I judge thirty-five or forty miles an hour, that is, just before I started to pass the truck.

Q. What did you do in trying to stop, when this tire incident occurred?

A. I naturally was trying to stop it but the road being as slick as it was, I was afraid to apply the brake very hard and my foot must have slipped off the brake and hit the accellerator because I felt the car lurch just before it rolled over.

Q. Was it raining at that time?

A. It was drizzling.

(Testimony of Rulon D. Hair.)

Q. What was the condition of the oiled portion of the highway, with reference to being slippery?

A. There are sections that are slippery and sections that are not, they are distinctively marked, I don't recall whether that was or not.

Q. Are you well acquainted with that road?

A. Yes, sir.

Q. Are there cross-roads from the underpass to where this accident occurred leading off the main road?

A. Yes, sir.

Q. More than one? A. Yes, sir.

Q. Do you know who was driving the semi-trailer that you passed on that day?

A. No, sir.

Q. Did you have an opportunity to get its number?

A. No, sir.

Q. Did it stop or not?

A. No, sir, he didn't.

Q. If you had been,—strike that please,—have you ever been able to find out who it was?

A. No, sir.

Q. What happened at the scene of the accident? How did the accident occur?

A. It was caused by me driving or turning out on the soft shoulder to try to avoid the truck.

Q. Your accident occurred after you passed the truck?

A. Yes, sir.

Q. How did the car come to a stop?

A. It was upside down.

Q. What did you do then? [451]

A. I got out as soon as I could.

(Testimony of Rulon D. Hair.)

Q. Up to this point Mrs. Newby had been sitting by the side of you in the truck?

A. Yes, sir.

Q. Had she made any comment or complaint touching the driving? A. No, sir.

Q. She hadn't said anything?

A. No, not about the driving.

Q. Do you remember what you were talking about, if anything? A. No, sir, I don't.

Q. Now, what was the next thing you did,—after you tipped over you say you got out of the car? A. Yes, sir.

Q. Was the horn honking at that time?

A. Yes, sir, it was.

Q. Do you remember when it commenced honking?

A. It must have commenced after the car rolled over and shorted it.

Q. Did anyone stop there? A. Yes, sir.

Q. Who was it? A. Mr. McGuire.

Q. Was he the man who testified here a few days ago? A. Yes, sir.

Q. What did you do then? [452]

A. We took Mrs. Newby in Mr. McGuire's car to the hospital at Montpelier.

Q. Then the three of you went to Montpelier?

A. Yes, sir.

Q. Then what was done?

A. Mr. McGuire went to the hospital.

Q. Mr. McGuire went to the hospital?

(Testimony of Rulon D. Hair.)

A. Yes, to find out the best way of moving her out of the car to the hospital and the doctor came down and took her to the hospital.

Q. How long did you remain at the hospital?

A. I was there about a hour as I recall.

Q. Then what did you do?

A. I went to the Chevrolet place.

Q. The Chevrolet place, what do you mean?

A. The Chevrolet garage, which is just around the corner, to try and get a wrecker.

Q. Did you get one?

A. No, sir, their's were all out.

Q. What did you do then?

A. I went to the Ford garage.

Q. What did you do at that time?

A. They had a wrecker, so we went out to the scene of the accident.

Q. Who went out? [453]

A. Mr. Oxenbine and some other fellow that was at the garage. I don't know whether he was an employee or not.

Q. The three of you went to the scene of the wreck?

A. Yes, sir.

Q. What time of the evening did you get out there?

A. I don't know for sure.

Q. Was it dark?

A. No, it wasn't dark, no, sir.

Q. Whom did you see out there, if anybody?

A. There was Sheriff Bunderson and two or three other people that I didn't know.

(Testimony of Rulon D. Hair.)

Q. What did Mr. Oxenbine do, if you remember?

A. He proceeded to get the truck in line to tow back to Montpelier.

Q. Did you ride with Mr. Oxenbine or with Sheriff Bunderson on the way back?

A. I rode back with the wrecker.

Q. Did you talk with Mr. Bunderson at the scene of the accident?

A. I talked to him, naturally.

Q. Did you talk about how the accident occurred at that time or was it later?

A. I don't recall anything being said at the scene of the accident about the accident.

Q. Did you observe Mr. Bunderson doing any measuring at that time?

A. No, sir, we were all busy picking up tobacco.

Q. How long were you there?

A. I wouldn't know, but it was long enough to upright the truck.

Q. Was it more than a few hours or not so long?

A. It wasn't very long.

Q. Then when you came back to Montpelier what did you do?

A. We took the car to the Ford garage first.

Q. Then what did you do?

A. Then I went to the Police Station to fill out an accident report.

Q. Who did you see there?

The Court: I think we will take a ten minute recess at this time.

(Testimony of Rulon D. Hair.)

11:10 A. M. March 22, 1945

Q. Who did you see at the Police Station?

A. There was Sheriff Bunderson and two other policemen if I remember right.

Q. Did you fill out an accident report at that time? A. No, sir.

Q. Did you later?

A. I filled one out the next morning.

Q. Where did you fill it out the next morning?

A. That was at the police station.

Q. Did you discuss with Mr. Bunderson, the cause of the accident? A. Yes, sir. [455]

Q. Did you explain how it happened?

A. Yes, sir.

Q. Did he ask you questions about it?

A. Yes, sir, we discussed it thoroughly.

Q. Did you fill out a report in his presence?

A. Yes, sir.

Q. I believe you said it was the next morning after the accident that you filled out the report?

A. Yes, sir.

Q. How long were you at the police station that night,—that would be Friday night the 11th of September?

A. I was there for quite a while. I wouldn't say how long.

Q. Who was there besides Mr. Bunderson the Sheriff and you?

A. Well, there was there two other officers. One kept coming in and going out, I imagine he was on

(Testimony of Rulon D. Hair.)

duty. I don't know whether he was there the entire time or not.

Q. I hand you what has been admitted as defendant's exhibit 7. Is that the report that you made out for Mr. Bunderson the Sheriff?

A. Yes, sir.

Q. Did you see Mr. Bunderson, the Sheriff, make out a report?

A. I saw him start one, but I don't recall whether I saw him finish it or not.

Q. After you made out this report, exhibit 7, what did you do with it? [456]

A. Turned it over to Mr. Bunderson.

Q. Left it with him, did you? A. Yes, sir.

Q. Had you discussed the manner or the character of the accident with him before you made out the report?

A. The night of the accident, yes sir.

Q. Then you made out the report for him the next day? A. Yes, sir.

Q. Mr. Hair, did Mr. L. R. Donnelly come to Montpelier? A. Yes, sir.

Q. When did he come up there?

A. I think it was on the 12th as I remember.

Q. Where did you first see him,—withdraw that,—you say it was on the 12th, what day of the week would that be, do you know? A. Saturday.

Q. Had you telephoned him?

A. I telephoned him Friday night, but I couldn't contact him, but I did get in contact with

(Testimony of Rulon D. Hair.)

his home, however, and I told his wife what had happened.

Q. Did you tell his wife anything about Avenel Newby? A. No, sir.

Q. You didn't mention Avenel in the telephone conversation? A. No, sir.

Q. Or anything about a guest being in the car?

A. No, sir, I didn't.

Q. When did Mr. Donnelly get to Montpelier?

A. It was the day of the 12th.

Q. Where did you meet him?

A. At the Burgoyne cabins as I remember.

Q. Were you stopping there? A. Yes, sir.

Q. Did you engage in any conversation with him in the presence of others touching this matter?

A. I could have.

Q. Do you remember whether you did or not?

A. Well, there is no question but what I did.

Q. Was there anything said about your having a guest in this car?

Mr. Davis: As to this conversation between him and Donnelly, unless it is shown that Mr. Newby was present I shall have to object. If he was present then, of course, I have no objection.

Q. Do you remember the conversation that you had with Mr. Donnelly at a time when Mr. Newby was present? A. Yes, sir.

Q. Where did that take place?

A. At the police station and at the Utah Oil Service Station on the corner by the Burgoyne cabins.

(Testimony of Rulon D. Hair.)

Q. What day was that? [458]

A. That was on Sunday.

Q. Now, Mr. Hair, had you told Mr. Donnelly up to this time that you had a guest in the car?

A. No, sir.

Q. Was anything said about it at that time and at that conversation?

A. Yes, sir, there was.

Q. What was said?

A. Well, at that conversation we discussed it and the condition of Mrs. Newby and everything in general.

Q. How did the information come out that you had a guest in the car?

A. As I remember it Mr. Russell Tuescher and his brother,—I don't recall whether there was anyone else there or not,—they drove up and informed me, as he says, that his sister was in a very serious condition, or words to that effect. At that time Mr. Donnelly walked up and I think that was the first time anything was said.

Mr. Davis: I wonder if Mr. Newby was there?

A. I don't think he was there when Mr. Donnelly first learned about the passenger. I don't think Mr. Newby was there then.

Q. When Mr. Donnelly first learned about a passenger being in the car, what was said with reference to your further employment? [459]

A. I don't recall whether there was anything said at that time or not.

Q. Were you continued in the employ of the Company?

A. No, sir.

(Testimony of Rulon D. Hair.)

Q. When were you discharged?

A. Within a half hour after he found out.

Q. After Mr. Donnelly found out?

A. Yes, sir.

Q. By whom were you discharged?

A. Mr. Donnelly.

Q. Have you worked for the Company since that time? A. No, sir.

Q. I believe you made some reports to Mr. Donnelly? A. Yes, sir.

Q. Concerning this accident? A. Yes, sir.

Q. How many did you make? A. Two.

Q. I hand you plaintiff's exhibit 10,—no that is not right, it is plaintiff's exhibit 15. Is that a report which you made? A. Yes, sir.

Q. I call your attention to that report in answer to question number 24, "which injured was in your car?"—no, I will ask you to look at question numbered 21, "Injured's name" [460] nothing appears as to that?

A. That is the way this report appears.

Q. Is there anything in that report reciting that Avenel Newby or anyone was in the car and was injured that day? A. No, sir, there isn't.

Q. When was that report made?

A. The day of the accident.

Q. When did you make another report?

A. I think I corrected it,—corrected the report and that was made out on Sunday.

Q. I now hand you plaintiff's exhibit 16 intro-

(Testimony of Rulon D. Hair.)

duced in evidence and I will ask you what that is, if you know?

A. That is the corrected report.

Q. Is there anything in that report with respect to Mrs. Newby? A. Yes, sir.

Q. What is the fact as to whether that report was made out after Mr. Donnelly learned of Mrs. Newby's being in the car?

A. I think it was.

Q. Now, Mr. Hair, in answer to question 15 on that report and also the same question,—number 15,—on the first report; “was the driver on own business or that of owner?” You wrote “owner” was that a fact? A. Not at that time, no.

Q. At the time of the accident were you on the business of the owner of the car?

A. No, sir, I wasn't.

Q. Had you been for some time, probably since you picked her up in Montpelier the night before?

A. No, sir.

Q. During the period of time from the time you picked her up on the evening of the 10th at Montpelier until the accident happened on the highway about four-thirty on the afternoon of the 11th, had you been doing any business for either of these defendants, the R. J. Reynolds Tobacco Company or L. R. Donnelly? A. No, sir.

Q. Then why did you insert the word “owner” in answer to this question? A. I don't know.

Q. Why did you not make a report touching

(Testimony of Rulon D. Hair.)

Mrs. Newby with reference to the first of these reports?

A. Because I understood from the reports that I had from the hospital that her condition was favorable and I didn't want to report it if her condition was that way.

Q. You didn't want the company to know that you had a guest with you? A. That's right.

Q. You didn't want the company to know that you were not on [462] their business at that time?

A. That's right.

Q. And you didn't want Mr. Donnelly to know that you were not on the business of the Company at that time? A. That's right.

Q. You knew that you were not doing business for the Company and that you were out on a party of your own at the time? A. Yes, sir.

Q. Now, Mr. Hart, there has been some evidence introduced about an accident which you had in April, 1939, in Pocatello, what is the fact as to whether you had any accident of any kind or character with the company car or otherwise between that date and the 11th day of September, 1942? A. No, sir, I didn't.

Q. What kind of a driving record did you have?

A. It was good so far as I know.

Q. Do you know what the National Safety Council is? A. Yes, sir.

Q. What is it?

A. It is an organization who control,—or it is

(Testimony of Rulon D. Hair.)

organized to control the safety of the general public throughout the nation.

Q. Did you ever make reports to this National Safety Council? A. No, sir, I didn't.

Q. Do you know whether reports were made by others with respect to you? [463]

A. In the event of accident, yes, sir, there would be.

Q. Did you ever receive any card or award from this association? A. Yes, sir.

Q. I meant from the National Safety Council?

A. They issue cards and emblems every year as long as you don't have an accident.

Q. Did you have any emblem or card given to you?

A. Yes, sir, I had several of them.

Q. When did you get your last one, prior to this accident in September, 1942?

A. It was in the summer of 1942.

Q. Do you have that card with you?

A. Yes, sir.

Q. Will you produce it? A. Here it is.

Q. Did you receive one in 1941?

A. Yes, sir.

Q. Do you have that with you?

A. No, sir, I haven't.

Q. I am handing you exhibit 27,—defendant's exhibit 27 and ask you if you know what it is?

A. Yes, sir.

Q. What is it?

(Testimony of Rulon D. Hair.)

A. It is a card that I received for three years without an accident. [464]

Q. From whom did you receive it?

A. The National Safety Council.

Q. When did you receive that?

A. It was in the summer of 1942.

Q. Before or after this accident in September?

A. Before.

Mr. Merrill: We offer in evidence this card as exhibit 27.

Mr. Davis: No objection.

The Court: It may be admitted.

Mr. Merrill: I will read this: "National Safety Council, Inc., Chicago, Illinois, 20 North Wacker Drive. Number 4989, Date 4-16-1942.

This is to certify that R. D. Hair has operated a commercial vehicle for R. J. Reynolds Tobacco Co., throughout three years without an accident. 45,900 miles operated. The National Safety Council's No Accident Driver Award is given in recognition of this accomplishment. R. D. McKenzie for the Company. W. H. Cameron for the National Safety Council."

Q. Do you know who R. D. McKenzie is?

A. No, sir.

Q. Whether he is a representative of the Reynolds Tobacco Company?

A. No, sir, I don't know. [465]

Q. Did you make reports to the Company touching the condition of your car and concerning the miles driven and what had been done and so forth?

(Testimony of Rulon D. Hair.)

A. Yes, sir, every day.

Q. What is the fact as to whether you received letters of commendation touching your driving situation?

A. Yes, sir, I received several of them.

Q. I hand you what has been introduced as defendants' exhibit 20 and ask you if you ever saw the original of which that purports to be a carbon copy?

A. Yes, sir, as far as I can recall.

Q. Did you receive a similar letter or letters for other years?

A. Yes, sir.

Q. What is the fact as to whether you received similar letters of commendation in 1941 and 1942?

A. Yes, sir, I did.

Mr. Merrill: That's all, you may examine.

Cross Examination

By Mr. Davis:

Q. Have you ever been convicted of a felony?

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial, and highly prejudicial.

The Court: I will sustain the objection.

Q. Mr. Hair, how did you register at this hotel on the [466] morning of September 11th?

A. I don't recall.

Q. Why can't you recall that?

A. Well, because there was some dispute how we should register.

Q. Between who?

A. Mrs. Newby and myself.

Q. What was that dispute?

(Testimony of Rulon D. Hair.)

A. Where it should be Mr. and Mrs.

Q. She wanted you to register as Mr. and Mrs., I suppose? A. I don't recall.

Q. What was the argument about?

A. There was no argument.

Q. What did you do in that room when you took Mrs. Newby there?

A. Went up and to bed.

Q. What did you do after you got there?

A. Laid down and went to sleep.

Q. Did you lie down with Mrs. Newby?

A. Laid down together.

Q. Do you say that you had intercourse with her in that room? A. No, sir.

Q. Did you do anything with her that wasn't proper?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [467]

A. No, sir.

Q. Did you take off your clothes there?

A. No, sir.

Q. Did she? A. No, sir.

Q. You knew that she was married?

A. Yes, sir.

Q. You knew that she had little children?

A. Yes, sir, I did.

Q. Saw them with her the day before?

A. Yes, sir, one of them.

Q. When you saw her the day before were you on Company business?

(Testimony of Rulon D. Hair.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I had just finished, had just finished the company business for the day and was quitting for the day.

Q. You were coming out of a store you had called on? A. Yes, sir.

Q. When you had this lady in the car or the truck with you in or near Dubois, Clark County, Idaho, were you on company business?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [468]

A. Yes, sir, I was.

Q. And you had another woman in the car when you were on company business, or rather other women besides the one at Dubois?

A. My wife.

Q. Mr. Donnelly knew about that didn't he?

A. No, sir.

Q. You and Mr. Donnelly were great friends?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. As friendly as business employees can be.

Q. He went to your house and had meals with you? A. Yes, sir.

Q. Did he ever bring his wife to your house?

A. Not that I recall.

Q. You spent your vacation together?

(Testimony of Rulon D. Hair.)

A. Yes, he had his wife to my house at that time.

Q. You took your wife in the car with you up to Ponds? A. Yes, sir.

Q. You know that wasn't your wife, that it was another woman? A. No, sir, it wasn't.

Q. The time you and your wife went to Ponds was after the time you and Donnelly and Roe had this talk at the Hotel wasn't it?

A. Yes, sir. [469]

Q. At that time your wife heard these gentlemen say that if you hauled any guests or passengers that it would cost you your job?

A. Yes, sir.

Q. Do you say that your wife, when she knew it would cost you your job, still rode with you on company business? A. Yes, sir.

Mr. Merrill: I object to that as incompetent, irrelevant and immaterial.

The Court: He has answered and the answer may stand.

Q. Your wife had tried to help you get back with the company? A. No, sir.

Q. She hadn't? A. No, sir.

Q. She hadn't talked to Mr. Roe to help you get your job back? A. No, sir.

Q. And she hadn't talked to Mr. Donnelly to try to help you get your job back?

Mr. Merrill: We object to this unless it is shown that the witness was present at the conversations.

The Court: He may answer.

(Testimony of Rulon D. Hair.)

A. No, sir.

Q. Your wife knew when she rode with you that it was against company orders? [470]

Mr. Merrill: Objected to as repetition.

The Court: Sustained.

Q. Mr. Hair, you consider yourself an expert driver? A. I wouldn't say an expert.

Q. How many miles a year did you drive during the time you worked for the R. J. Reynolds Tobacco Company?

A. About seventeen thousand miles.

Q. Each year? A. Yes, sir.

Q. In that truck? A. Yes, sir.

Q. This day when you were driving the truck there was no one interfering with you?

A. No, sir.

Q. Avenel didn't interfere with you in any way?

A. No, sir, she didn't.

Q. Now, on the Exhibit 27, on the bottom is signed for the company, R. D. McKenzie. Who is that?

A. I am not acquainted with the name.

Q. That is for the R. J. Reynolds Tobacco Company? A. I don't know.

Q. You didn't send any information in?

Mr. Merrill: We object to that——

Mr. Davis: I hadn't finished the question.

Mr. Merrill: I beg your pardon. [471]

Q. You didn't send any information in that enabled you to get a card from the National Safety Council.

(Testimony of Rulon D. Hair.)

Mr. Merrill: Now we object to that unless it is limited as to who he might have sent it to.

The Court: Objection overruled.

A. Well, I don't know how they determine that. How they get the information to the National Safety Council.

Q. Who sent the information to the Safety Council, you or the R. J. Reynolds Tobacco Company.

A. I didn't, and I don't know who did.

Q. You never did send any in? A. No, sir.

Q. I call your attention to the fact that the date of this is 4-16-42, that would be the 16th of April, 1942? A. Yes, sir.

Q. It says "throughout three years without an accident." A. Yes, sir.

Q. I call your attention to the fact that within some two years and four months prior to this you had been convicted of manslaughter for killing a man while you were under the influence of liquor. Do you know whether that information was given to the National Safety Council?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It is prejudicial and this award is given for—— [472]

The Court: ——The objection is overruled.

A. No, sir.

Q. Do you know whether the information was given to the safety council that you were arrested in Clark County while intoxicated?

Mr. Merrill: Objected to as incompetent, irrele-

(Testimony of Rulon D. Hair.)

vant and immaterial. There is no proof of such fact in this record.

The Court: Sustained.

Q. Did the safety council get the information, if you know, of the occurrence that happened in Clark County, that Sid Close testified to?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and it asks this witness to testify concerning the testimony of some other witness and it is fundamentally improper.

The Court: Sustained.

Q. Do you know if the Safety Council had the information that you were hauling guests in this car contrary to company instructions?

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. No, sir, I don't.

Q. What was the name of the lady that you had with you in Clark County who was one of your dealers in Idaho Falls? [473]

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. I don't recall her name.

Q. You did business with her in Idaho Falls?

A. Yes, sir.

Q. Sold her company products?

A. Yes, sir.

Q. And you don't recall her name. What were the names of some of these other people you hauled besides your wife?

A. Well, there was Mr. Rasmussen this one par-

(Testimony of Rulon D. Hair.)

ticular time and Mrs. Newby and Mr. Eckersley, my wife and this dealer at Idaho Falls.

Q. Can you think of anyone else now?

A. No, I think that would cover them.

Q. How many times did you haul Mr. Rasmussen?
A. There was once or twice.

Q. When was that?

A. When we went to dinner at the Aero Club on a previous trip.

Q. And you hauled this other salesman that you can't remember his name?

A. I never did learn his name. He was a new man in the territory.

Q. Who was he working for?

A. A soap company.

Q. I thought you introduced him to Mrs. Newby?
A. I did.

Q. Did you introduce him by any name? [474]

A. I suppose I did, but I don't recall the name?

Q. What does Mr. Rasmussen do?

A. He is a salesman.

A. For whom? A. Competitive company.

Q. A salesman for a competitive company?

A. Yes, sir, I think Brown and Williamson.

Q. Did he travel the same territory you did?

A. Yes, sir.

Q. Have the same customers in Soda Springs?

A. Yes, sir.

Q. He also had some customers in Grace?

A. Yes, sir.

Q. And in Montpelier?

(Testimony of Rulon D. Hair.)

A. Yes, sir.

Q. You saw him at Soda Springs about eleven o'clock on the day of the 11th of September, 1942?

A. Yes, sir.

Q. You told him to tell your wife that you would not be in until later?

A. To tell her I would not be in until after him.

Q. And you later went out to look for him?

A. Yes, sir.

Q. You had already told him what to tell your wife? [475]

A. Yes, sir.

Q. Where did you look for him in Grace?

A. On the street and I went to one of the dealers.

Q. That was one of the dealers you regularly dealt with? A. Yes, sir.

Q. Now, Mr. Hair, what were you going to do with this tobacco that you had in this truck?

A. Sell it.

Q. Who were you going to sell it to?

A. I don't just how to answer that for there are three——

Q. ——Let me ask this, who was to get the money for it when it was sold? A. I was.

Q. Who were you going to remit it to?

A. The Rino Candy Company.

Q. Who is the Rino Candy Company?

A. A jobber of ours.

Q. Jobber for the R. J. Reynolds Tobacco Company? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. That was the way you handled the Reynolds Tobacco Company customers? A. Yes, sir.

Q. Was the truck well loaded with tobacco?

A. Yes, it generally was loaded. [476]

Q. Was it loaded at that time?

A. Yes, sir.

Q. When did you fill it up?

A. On Saturday afternoon or early Monday morning I usually did.

Q. You had been at Soda Spring on the 8th of September? A. Yes, sir.

Q. What were you doing there then?

A. Soliciting the dealers.

Q. Did you stay at Soda Springs all night on the 8th?

A. Yes, if that is the day I was there.

Q. Where did you leave this Company truck that night?

A. There in front of the hotel or in the garage. If conditions were favorable out I would leave it out.

Q. It wasn't unusual to leave this truck on the street all night while you were calling on the trade in the smaller towns?

A. I left it out but not in the larger towns.

Q. Did you leave it out in Montpelier?

A. In front of the cabin I lived at.

Q. You also carried advertising matter for the Company? A. Yes, sir.

Q. It was your duty to advertise the Company products? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. If anybody had asked you for tobacco on the 11th of September, that is the day of the accident, you would have sold it to them, would you? [477]

A. Yes, sir.

Q. Would you have sold them tobacco if they had asked you on the 11th of September?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, I suppose I would.

Q. Was the Aero Club one of your customers?

A. Not a regular customer.

Q. Were they one of your customers, whether they were regular or not?

A. They are considered a customer.

Q. Did you call on them?

A. Not in the course of my business.

Q. These night clubs or cafes that operate at night, were these your customers in your territory?

A. Well, any place that carries tobacco is considered a customers. However, I don't call on dealers that just sell cigarettes. I wasn't interested in selling cigarettes so much.

Q. If you call on these customers and if they want any of your products you will sell them won't you?

A. Yes, sir.

Q. Whether it was at night or in the day time?

A. Yes, sir. [478]

Q. You visit customers in order to do just general work even when you didn't sell them?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. It was part of your business to call on them and tell them hello, whether you sold them tobacco or not? A. Yes, sir.

Q. Who paid your expenses to come to this trial?

Mr. Merrill: Objected to as being entirely immaterial, he is under our subpoena, and of course, we will have to pay him.

The Court: I guess it has been answered now.

Q. Did anybody arrange for your room in Pocatello before you came here?

Mr. Merrill: Objected to as immaterial.

Mr. Davis: Withdraw it.

Q. How many times have you seen Mr. Donnelly since you were fired?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: I can't see the materiality of it.

Mr. Davis: Withdraw it.

Q. Are you and Mr. Donnelly good friends?

A. Yes, sir.

Q. You want to help Mr. Donnelly if you can?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. Yes, sir, I would help him if I could.

Q. You thought that Mr. Donnelly could get you out of the scrape with the Company up until you found out that Mrs. Newby was seriously injured, didn't you?

(Testimony of Rulon D. Hair.)

Mr. Merrill: Objected to as immaterial, irrelevant and unfair in its wording.

The Court: He may answer.

A. No, sir, I didn't.

Q. You knew that Mr. Donnelly had gotten you out of trouble before?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: Sustained.

Q. Was there any sign on this car, "no guests or passengers"? A. No, sir.

Q. You signed a statement similar to the one counsel read to you which was upon receipt of the car in 1942,—you signed a similar statement in 1937?

A. Yes, sir, every time we received a car.

Q. The Company kept warning you that carrying guests was a violation of instructions? [480]

A. That was general literature they sent to everyone driving cars I imagine.

Q. The Company kept warning you not to carry guests? A. Yes, sir.

The Court: We will recess at this time until 1:30 this afternoon.

March 22, 1945, 1:30 P. M.

Cross Examination

(Continued)

Q. How old are you, Mr. Hair?

A. Thirty-two.

(Testimony of Rulon D. Hair.)

Q. How old were you in September 1942?

A. Thirty as I recall.

Q. These reports you made to the company from time to time, have you copies of them?

A. No, sir, I haven't.

Q. I will ask you if you know—Strike that please,——

Mr. Davis: May I ask counsel if they have any of the witness' reports with them here?

Mr. Merrill: No, we don't.

Q. You were warned about your driving, by the Sheriff of Clark County?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. No, sir, I wasn't. [481]

Q. Mr. Close didn't warn you about driving in his county while you were intoxicated?

A. No, sir.

Q. Were you warned by Mr. Pugmire here in Pocatello,—Mr. Pugmire was the Chief of Police?

A. No, sir.

Q. You have been over the road from Soda Springs to Montpelier a great many times have you not? A. I would average once a month.

Q. Over a period of some five or six years?

A. Yes, sir.

Q. You consider that you were thoroughly familiar with that road did you? A. Yes, sir.

Q. How far was it from where Mr. McGuire passed you to where your truck overturned?

(Testimony of Rulon D. Hair.)

A. It was about ten miles.

Q. How long after your truck overturned was it before Mr. McGuire got there?

A. I don't know.

Q. What is your best judgment?

A. I wouldn't attempt to say.

Q. Do you have any idea how long it took you to get out of the truck after it turned over?

A. Well, I was pretty well jumbled up in there. I don't [482] know just how long it took me to get out. I had a blow on the head that stunned me a little.

Q. Do you think it would be ten or fifteen minutes? A. No, not that long.

Q. How long did it take you to drive from where Mr. McGuire passed until you got to the place where the truck turned over?

A. I don't know.

Q. You know that you were going about thirty or forty miles an hour? A. Yes, sir.

Q. And it was about ten miles?

A. Yes, sir.

Q. That would be a matter of computation?

A. Yes, sir.

Q. Do you know how fast Mr. McGuire was driving? A. No, sir, I don't.

Q. Do you have any idea how far ahead of Mr. McGuire you got?

A. About ten miles ahead.

Q. How far in front. He traveled behind you in the same direction?

(Testimony of Rulon D. Hair.)

A. In the same direction, yes, sir.

Q. You were not ten miles ahead of Mr. McGuire?
A. I couldn't see him.

Q. You traveled ten miles before you turned over? [483]

A. That's what I mean.

Q. Did you look in your mirror to see if he was coming after you passed him?

A. I don't recall that I did.

Q. Then you don't know how far you pulled ahead of him when he was traveling along in the same direction you were going?

A. I couldn't tell, I pulled off and went around the side of his car.

Q. Now, Mr. Hair, this truck you say you met, how large a truck was that?

A. Just a real large semi-truck ten or eleven feet high.

Q. It wasn't a farm truck?
A. No, sir.

Q. It was a commercial vehicle?

A. Yes, sir.

Q. How many times larger than yours?

A. I couldn't say.

Q. It was many times larger was it?

A. Yes, sir.

Q. What would you estimate that would weigh?

A. About sixteen thousand.

Q. These cross-roads and side-roads you saw leading off the main highway from the time you passed Mr. McGuire. I am directing your attention to where your truck finally turned over along the

(Testimony of Rulon D. Hair.)

side of the road or highway, [484] were there any side-roads back there in a distance of one mile that went off to the side of the highway?

A. I couldn't say, but I think there was.

Q. You think there was?

A. I think there was a farm house off to the side.

Q. Is there any main traveled road that goes off that highway within a mile of where your truck turned over?

A. I wouldn't say for sure.

Q. Is there any within two miles?

A. I wouldn't know for sure.

Q. Would you know if there was any within three miles?

A. I know there are cross-roads but I don't know where they are.

Q. What is your best judgment as to how far ahead of the McGuire car you got. You don't think you got more than a mile ahead of it?

A. Ahead of what?

Q. How many miles ahead of the McGuire car do you estimate that you got before your truck tipped over?

A. I don't know.

Q. You don't think it could have been over two or three miles?

Mr. Merrill: Objected to as argumentative and it has been answered.

The Court: He may answer.

A. I don't know. [485]

(Testimony of Rulon D. Hair.)

Q. Did you tell Mr. McGuire that some truck had crowded you off the road?

A. I don't think we had any conversation about that, I don't know whether I did or not.

Q. Did you try to get out a complaint against the man that drove that truck that pushed you off the road?

A. I left that to the law enforcement officers.

Q. Did you tell the Sheriff that you would like to have that man found?

A. I did not, I figured it was his business.

Q. You were interested in knowing who it was?

A. Naturally.

Q. The shoulders along the highway were soft all the way from Soda Springs to where you tipped over?

A. Yes, sir.

Q. When you went over there from one side to the other Mr. Oxenbine couldn't see your tracks where you crossed the road, very plainly?

A. I could see them.

Q. Did you follow them? A. No, sir.

Q. Did you question the Sheriff's measurements of your tracks?

Mr. Merrill: We object to this, it is improper to measure one witness' testimony against another's.

The Court: He may answer.

A. No I don't. [486]

Q. You think they are correct?

A. They should be.

(Testimony of Rulon D. Hair.)

Mr. Merrill: I move to strike that answer as a conclusion of the witness.

The Court: It may stand.

Q. When you went out with Mr. Oxenbine did you say anything to him about some semi-trailer pushing you off the road?

A. I don't know whether I did or not.

Q. You don't remember? A. No, sir.

Q. Your tire blew out as soon as you went off the road the first time?

A. I wouldn't say that it did or didn't. It seemed to me that it blew out when I passed the truck the first time.

Q. It hit a rock?

A. That is what I surmised.

Q. You didn't go back and see if it hit a rock?

A. I was interested in the merchandise scattered over the road.

Q. Were you interested in anything other than the merchandise scattered over the road?

A. Naturally.

Q. Were you interested in this lady?

A. You bet I was.

Q. You were interested in this man that pushed you off the road? [487]

A. I wouldn't say that he pushed me off the road. There would be a clearance of about nine inches if he was on his side of the road.

Q. You considered that he was at fault?

A. Not necessarily.

(Testimony of Rulon D. Hair.)

Q. You were interested in whether you hit a rock back there or not?

A. I was interested but I didn't go back.

Q. You didn't go back?

A. I was busy picking up the tobacco.

Q. How much did your truck weigh?

A. What was that?

Q. How much did your truck weigh?

A. That would be pretty hard to say.

Q. What is your best estimate?

A. About four thousand pounds.

Q. With the load that was on it?

A. Yes, sir.

Q. Where was the load in your truck, mostly in the back end?

A. It was all situated behind the driver's compartment.

Q. What was the first thing back of the driver's seat?

A. A space for the advertising.

Q. What did you do with that advertising material out in the territory?

A. Tacked it up or made displays with it, whatever it called for. [488]

Q. Was the back end of your truck inclined to swerve and sway when the road was wet?

A. It would do that even on dry roads when the car got out of control.

Q. You think your foot slipped off the brakes and got on the gas accelerator?

A. That's the way it appeared but I wouldn't say that it happened.

(Testimony of Rulon D. Hair.)

Q. You were sober? A. Yes, sir.

Q. Is it generally uphill from Soda Springs to Montpelier? A. It is up and down.

Q. Is the elevation higher at Montpelier?

A. I wouldn't know.

Q. Would you say that it was generally up-grade?

A. Well, it is generally up-hill I think.

Q. I will ask you if it is not a fact that with that truck going thirty-five miles an hour if you took your foot off the gas at the time you first had the accident that it would practically stop within eight hundred feet?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It is argumentative and it doesn't take into consideration the incline or the decline of the road.

The Court: He may answer. [489]

A. I don't know.

Q. Did anything happen to the tire outside of the blow-out? A. I don't know.

Q. The tire was in good shape except where it was blown out? A. I imagine it was.

Q. Didn't you testify so before?

A. I don't recall.

Q. Well, what was the condition of the tire outside of the blow-out hole?

A. It looked in good condition.

Q. You know if that tire was blown out, and if it blowed out at the time you first went off the road and you would have traveled eight hundred feet

(Testimony of Rulon D. Hair.)

with a four thousand pound load that it would tear that tire to pieces?

Mr. Merrill: Objected to as argumentative.

The Court: He may answer.

A. No, I don't know.

Q. You say that it blew out, in your opinion, when you first went off the road?

A. In my opinion.

Q. And it traveled all that distance and all it showed was a spot in the tire when you saw it at the garage?

A. Yes, sir.

Q. Did anyone else have a right to drive this truck except you?

A. Company employees. [490]

Q. Did any other company employee ever drive it after it was delivered to you?

A. Not that I recall.

Q. Who had control of this truck at all times while it was in your possession?

A. I did.

Q. Now, Mr. Hair, with reference to your exhibit number 7, all of that handwriting is yours, is it not?

A. No, not all of it.

Q. How much isn't in your handwriting?

A. Some here, I suppose the Court has put that on.

Q. What I mean is all of the handwriting?

A. The handwriting in the report, yes, except this L. R. Donnelly report, that is not mine, I didn't put it on there.

Q. You made out the report for the Sheriff in your own handwriting?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. He didn't tell you what to put in that?

A. No, sir.

Q. Exhibit number 27—no, exhibit 26, you received that some time in 1937, did you not?

A. Yes, sir.

Q. Now, exhibit number 19, that is your answer to the Company in reply to what you understood from the first exhibit?

A. Yes, sir. [491]

Q. That was back in 1937? A. Yes, sir.

Q. After that you did haul passengers?

A. Yes, I did.

Q. Contrary to these instructions?

A. Yes, sir.

Q. Then after you were found hauling Mr. Eckersley and your wife in the car, you agreed again not to haul any passengers? A. Yes, sir.

Q. You went right on hauling guests and passengers after that, didn't you? A. Yes, sir.

Q. Was the advertising on this truck when you got it? A. No.

Q. Who caused the advertising to be put on it?

A. That is the general policy in the states that allow advertising. The truck came out of Utah and it didn't have it on, they don't allow it.

Q. When was it put on there?

A. It was some time after the truck was delivered to me.

Q. Who had it put on? A. I did.

Q. Who had you do that?

A. I think I wrote for the form of transfers

(Testimony of Rulon D. Hair.)

and they sent them out. I requested these transfers to be sent out [492] from the factory.

Q. What do you mean by "transfers"?

A. Transfers, they are pasted on the panels, it is the advertising on the truck.

Q. Why did you put the advertising on the truck, what is it for?

Mr. Merrill: Objected to, it calls for a conclusion of the witness.

The Court: He may answer.

A. For advertising purposes.

Q. To advertise the products of the R. J. Reynolds Tobacco Company? A. Yes, sir.

Mr. Merrill: Objected to as it calls for a conclusion of the witness.

The Court: He has answered the question and the answer may stand.

Q. It was kept on there, and it was on there at the time of the accident on September 1, 1945?

Mr. Merrill: Same objection.

The Court: Same ruling.

A. Yes, sir.

Q. You kept it there for advertising purposes?

A. Yes, sir.

Mr. Merrill: We object, that is repetition.

The Court: He has answered, it may stand.

Q. It was necessary for your wife to go with you in your truck after December 1939?

Mr. Merrill: Objected to as immaterial and it assumes a condition not shown to exist.

The Court: I think——

(Testimony of Rulon D. Hair.)

Mr. Davis: —If the Court please, I will reframe the question.

Q. After 1939, did your wife ride with you in that truck considerable? A. No, sir.

Q. Did your wife have a driver's license?

A. Yes, sir.

Q. Did you have a driver's license after your conviction in 1939? A. I did.

Q. Did you have one after your conviction in Clark County?

Mr. Merrill: Now, I object to that as prejudicial and assuming a state of facts not proven. He has asked this same thing three or four times and it is prejudicial.

The Court: You can fix a date but not a conviction. You should reframe the question.

Q. Was your license revoked after the month of July 1939, after you had seen Mr. Close up in Clark County? A. No, sir.

Q. Your license never was revoked? [494]

A. No, sir.

Q. You had it all of the time?

A. Yes, sir.

Q. Was there any notation made on your license about a conviction? A. No, sir.

Q. How did you keep that from being done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: If there is any objection I will withdraw the question.

Q. Did you discuss with Mr. Donnelly that it

(Testimony of Rulon D. Hair.)

was likely that your license would be revoked after that conviction?

A. I don't remember anything said about it.

Q. You were fearful of that,—you and Mr. Donnelly thought if you were convicted that your license would probably be revoked didn't you?

Mr. Merrill: Objected to as calling for a conclusion of the witness and it is argumentative.

The Court: He may answer.

A. I knew if I was convicted, yes.

Q. You talked that over with Mr. Donnelly, that you might not be able to drive the truck if you were convicted? A. We might have done.

Q. Do you say that you didn't?

A. I would not say. [495]

Q. You told Mr. Donnelly and Mrs. Hair that you picked Mrs. Newby up on the road didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: He may answer.

A. I don't think so.

Q. You never told Mr. Donnelly that you picked up a passenger?

A. I told him on Sunday, but before that, no.

Q. When did you tell him that you picked up a passenger? A. On Sunday.

Q. Where did you say that you picked up a passenger?

A. I told him just what happened as I recall.

(Testimony of Rulon D. Hair.)

Q. Did you tell your wife that you picked her up on the road?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and it is also repetition.

The Court: He may answer.

A. I told my wife the same story because my wife and Mr. Donnelly were there together.

Q. How long was it after this accident that you left the State of Idaho?

A. I don't recall for sure, probably a week.

Q. You talked it over with Mr. Donnelly.

A. What?

Q. You talked over with Mr. Donnelly moving out of the State so that you could not be sued in the State Court, didn't you? [496]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and it is an unfair question.

The Court: I think he may answer.

A. I naturally would want to move back to where I came from.

Q. That is your answer to my question, is it?

A. That is my answer.

Q. Did you ever go back to Montpelier?

A. Yes.

Q. After you left there on Sunday after the accident?

A. Yes, I was in Montpelier after that.

Q. How long after?

A. I went through there.

Q. Did you learn when Mrs. Newby died?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. Did you go to the funeral?

Mr. Merrill: Objected to as immaterial and not proper cross examination.

The Court: He may answer.

A. No, I didn't.

Q. Did you ever tell Mr. Newby that you were sorry about this matter?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: In view of the objection, I will withdraw the question. [497]

Q. You knew that this truck belonged to the R. J. Reynolds Tobacco Company?

A. Yes, sir.

Q. You knew that when you signed the license application over at the Assessor's office, representing that it belonged to Mr. Donnelly? You knew that it wasn't true didn't you?

Mr. Merrill: Objected to as not proper cross examination, it is incompetent, irrelevant and immaterial.

The Court: He may answer.

A. At that time I was confused as to who the car belonged to.

Q. Now, calling your attention to exhibit number 17, you signed that at the time you received the car?

Mr. Merrill: Objected to as repetition, that has all been gone into before.

The Court: He may answer.

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. You signed one similar to that when you took the truck that you drove prior to the driving of this one? A. Yes, sir.

Q. You still say that you were confused and didn't know who the truck belonged to at the time you bought the license? A. Yes, sir.

Q. You are confused now?

A. No, it is cleared up now.

Q. But at the time you were confused? [498]

A. Yes, sir, this (indicating) came from the Company and the title was in Donnelly.

Q. You thought it was all right to sign in the name of Mr. Donnelly whether you knew the truck belonged to him or not, did you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and improper cross examination.

The Court: He may answer.

A. I got permission to do that and obtain the license plates.

Q. You had a passenger in that truck in the year 1940 and 1941 near the State line at Freedom?

A. No, sir.

Q. Who did you have in your truck near Freedom? A. I never have been that way.

Q. How far above Montpelier have you ever been?

A. I made the circle around Montpelier.

Q. Did you have a passenger with you there?

A. No one outside of Mr. Donnelly.

(Testimony of Rulon D. Hair.)

Q. This man Rasmussen you had him a couple of times you said, I believe?

A. I think so, a couple of times.

Q. Now, Mr. Hair, have you had an opportunity to see the course of your car marked as testified to by the Sheriff and marked on the exhibit that is now on the Board here (indicating)?

A. No, sir, I haven't.

Q. Step down and examine that, please. Now that you have [499] examined the exhibit, do you know the course as shown?

A. Yes I do now.

Q. Do you make any claim now that that exhibit does not fairly represent the distance traveled by your truck,—the truck that you were driving on that date and the course of the truck after you first went off the road?

Mr. Merrill: Objected to as not proper cross examination and it is immaterial.

The Court: He may answer.

A. No, I don't claim that isn't right.

Q. And on that exhibit, or rather on the exhibit you made to your company, the report, you drew a course of travel, or a rough drawing of what you considered at the time to show the course of the car after you hit that rock?

A. Yes, sir.

Q. You know the report I have in mind?

A. Yes, sir.

Q. That is the report you mailed to the Company?

A. That was a very brief sketch.

Q. Do you say that the brief sketch was correct?

(Testimony of Rulon D. Hair.)

A. It wasn't correct so far as measurements or anything like that was concerned.

Mr. Davis: That is all.

Redirect Examination

Mr. Mr. Merrill: [500]

Q. What was the brief sketch intended for that was on the exhibit that Mr. Davis just asked you about?

A. It was to give whoever received it a general idea of what might have happened.

Q. Did you have any idea of having accuracy of measurement?

A. No, it was just as it appeared in my mind.

Q. It was intended as a rough sketch?

A. Yes, sir.

Q. You mentioned Mr. Rasmussen having been with you on two occasions. When were those occasions? A. The night of September 10th.

Q. Immediately preceding the accident when you went up there with this woman?

A. Yes, and as I recall a couple of trips before, that we made monthly, that we had dinner at the Aero club.

Q. This other trip was up to the Aero Club there in Montpelier, was it?

A. Yes, sir.

Q. Nowhere else in the territory?

A. No, sir.

Q. No other time did you have him?

A. No, sir.

(Testimony of Rulon D. Hair.)

Q. With respect to the woman at Dubois one time in 1939, you had one woman in the car?

A. Yes, sir, I had her in 1939. [501]

Q. Was there any other time that you had this dealer? A. No, sir.

Q. Aside from Mrs. Newby on this particular night, was there any other time except the occasions you mentioned touching upon your wife, that you had a guest in the car? A. No, sir.

Q. How many times did you have your wife?

A. Two or three times.

Q. Over a period of how many years?

A. Three.

Q. That is the complete limit of all guest travel?

A. Yes, sir.

Q. Now, Mr. Hair, Mr. Davis has had shown to you a couple of exhibits, one being number 26, dated in November 1937, is that a special letter to you or a bulletin sent out to all drivers?

A. That is a bulletin to all salesmen or drivers, I suppose.

Q. How frequently did you get such bulletins?

A. Frequently, probably once a month.

Q. Now, I hand you exhibit number 19 and ask you if that is in reply to the bulletin you have in your hand? A. Well,—

Q. —Just a minute, or a subsequent bulletin that came to you, notice the date on that? [502]

A. That is what I was confused at before. It must have been a subsequent bulletin because of the fact of the dates. However it seems to correspond with answering this letter.

(Testimony of Rulon D. Hair.)

Q. Isn't it a fact that all the bulletins contained that instruction not to haul guests?

A. They are form letters.

Q. You received them frequently?

A. Yes, sir.

Q. Sometimes you answered them and sometimes you didn't?

A. Sometimes they require an answer, evidently this did not or it would say so.

Q. Only to those which required an answer you did reply? A. Yes, sir.

Q. Now Mr. Hair, you said you went into a place in Grace, Idaho, on the afternoon of the 11th of September 1942. For what purpose did you go into that place of business?

A. To inquire if Mr. Rasmussen had been in town.

Q. Did you have any other business there?

A. No, sir.

Q. Whose tobacco was in this automobile at the time of the accident. To whom did it belong?

A. It actually belonged to the Rino Wholesale Candy Company.

Q. Where are they located?

A. In Pocatello.

Q. Any sales would be reported for them and be for them? [503]

A. It would be for them but not reported to them.

Q. It would be for their credit?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. I think on cross examination the question was asked if you appeared on the witness stand for the purpose of helping Mr. Donnelly. You are here under subpoena are you not?

A. Yes, sir.

Q. That subpoena was served upon you?

A. Yes, sir.

Q. And you are here testifying in response to that? A. Yes, sir.

Q. What is your intention in testifying; to help someone or to tell the truth?

A. The truth as I know the facts.

Mr. Merrill: That is all.

Recross Examination

By Mr. Davis:

Q. You would not under any circumstances tell anything but the truth, would you?

A. Not if I knew it.

Q. You mean you would not if you thought you would get caught?

Mr. Merrill: That is objected to as not proper cross examination, it is an unfair question to ask any witness. [504]

The Court: He has not answered the question and I think the honors are about even here, I will sustain the objection.

Q. Where was this subpoena served on you?

A. Pocatello.

Q. You came from Salt Lake City without a subpoena? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. You came to be subpoenaed after you got here?

(No answer.)

Q. Why did you come?

A. Mr. Black told me apparently. I agreed to come up without a subpoena.

Q. You knew that you were outside the jurisdiction of this Court and didn't have to come?

A. No, sir.

Q. Your counsel didn't tell you that?

A. No, sir.

Q. You never were served with a subpoena? That is, you never were served until you got to Pocatello?

A. No, sir.

Q. After you got to the federal building?

A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill: [505]

Q. You were originally a defendant in this action?

A. Yes, sir.

Q. You had to come?

A. Yes.

Mr. Merrill: That is all.

Recross Examination

By Mr. Davis:

Q. I thought you said you came because you were subpoenaed?

A. I am here now because I was subpoenaed but I didn't come because I was subpoenaed.

Mr. Davis: That is all.

C. A. RASMUSSEN,

being called as a witness on the part of the defendants, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Merrill:

Q. Your name is C. A. Rasmussen?

A. Yes, sir.

Q. Where do you live? A. Pocatello.

Q. How long have you lived here?

A. A little over seven years.

Q. What is your occupation?

A. Tobacco salesman.

Q. For what company? [506]

A. Brown and Williamson.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. Did you know him in September 1942?

A. Yes, sir.

Q. Did you know the truck he was using at that time? A. Yes, sir.

Q. Did you see him on the evening of September 10, 1942? A. Yes, sir.

Q. Whereabouts? A. In Montpelier.

Q. Whereabouts in Montpelier?

A. We had adjoining cabins.

Q. Did you on that evening, see a lady by the name of Avenel Newby? A. Yes, sir.

Q. Where did you see her first?

A. Out by the cabin.

Q. At what time of the day or night?

(Testimony of C. A. Rasmussen.)

A. It must have been about eight or nine, it was after supper.

Q. In the evening? A. Yes, sir.

Q. With whom did she talk?

A. Talked with the three of us.

Q. Whom did she talk to first? [507]

A. Mr. Hair.

Q. What was the conversation there other than a mere introduction? A. That was all.

Q. What was done then?

A. We went back to the cabin.

Q. What was said or done there?

A. That is when we decided to go to the club.

Q. What do you mean by the club?

A. The Aero Club.

Q. Did you go? Q. We went up, yes, sir.

Q. Who went up?

A. Mr. Hair, Mrs. Newby, Mr. Higson, he was a soap salesman, I think that was his name.

Q. Did you know him?

A. That was the first time I met him.

Q. What time did you go to the Aero Club?

A. Some time between nine and ten.

Q. On the evening of the 10th of September?

A. Yes, sir.

Q. What did you do when you got up there, what was done and served generally?

A. It was a place of amusement. I talked to the proprietor.

Q. How long did you stay there?

A. Until a little before midnight. [508]

(Testimony of C. A. Rasmussen.)

Q. What did you do then?

A. The soap salesman and I came back home.

Q. Was anything said by either of you in the presence of Mrs. Newby regarding going home?

A. I think I suggested that Mr. Hair take us home, he brought us up.

Q. Did you wait for Hair and Mrs. Newby?

A. A short while.

Q. Did you come home with them?

A. No, sir.

Q. You came with someone else?

A. With someone else.

Q. Where was Mr. Hair and Mrs. Newby at the time you left that place? A. I don't know.

Q. They were still there? A. Inside.

Q. What did you do after you got home?

A. Got something to eat and went to bed.

Q. Did Hair come to the cabin that night?

A. I don't think he did.

Q. What did you do the next morning?

A. I went and knocked on his door, I expected him to go to breakfast with us.

Q. Was there any response? [509]

A. There was no response and I went in and nobody had slept in the bed.

Q. What did you do?

A. I went to work.

Q. Did you see Mr. Hair later that day?

A. Yes, sir.

Q. Where?

A. As I was through my work I noticed his car

(Testimony of C. A. Rasmussen.)

in Soda Springs and I wondered why he hadn't come back.

Q. Where was the car?

A. In front of the hotel.

Q. What hotel? A. The Enders Hotel.

Q. What did you do?

A. I went up and asked him——

Q. ——Where was he?

A. In his room.

Q. Did you go to the room? A. Yes, sir.

Q. Did you knock at the door?

A. Yes, sir.

Q. Did you see him?

H. He came to the hall.

Q. Did you see Mrs. Newby?

A. Yes, sir.

Q. Where was she? [510]

A. She was in the bed there.

Q. Did you talk to Hair? A. Yes, sir.

Q. And did Hair say anything to you?

A. Yes, sir.

Q. What did he say?

A. That he would be late getting home and please inform his wife.

Q. Was anything else said?

A. Not anything that I remember.

Q. What did you do?

A. I continued my work and came back to Pocatello.

Mr. Merrill: You may examine.

(Testimony of C. A. Rasmussen.)

Cross Examination

By Mr. Davis:

Q. How old are you? A. Forty.

Q. Are you a married man? A. Yes, sir.

Q. How many children have you?

A. Two.

Q. How old are they?

A. Fifteen and twenty-one.

Q. How long have you known Hair?

A. Shortly after I came up here.

Q. How long ago was that? [511]

A. In 1938 I think.

Q. You are still working for the same tobacco company? A. Yes, sir.

Q. You were both salesmen? A. Yes, sir.

Q. Friendly on the territory?

A. Competitors.

Q. Good friends on the territory?

A. Yes, sir.

Q. Are you good friends now?

A. Casual friends.

Q. Are you a casual friend of his now?

A. Yes, sir.

Q. Not a good friend? A. Not intimate.

Q. You like Mr. Hair? A. Yes, sir.

Q. Have a high regard for him?

A. Yes, sir.

Q. You knew on this evening before you got in the truck with Mr. Hair that he didn't have the right to haul passengers? A. Yes, sir.

(Testimony of C. A. Rasmussen.)

Q. You knew when you went with him to the Aero Club that he had no right to haul passengers?

A. Yes, sir.

Q. You didn't care about that? [512]

A. He invited me.

Mr. Merrill: We object to that as immaterial.

The Court: He has answered, it may stand.

Q. You didn't care?

A. I didn't care about it.

Q. It didn't make any difference whether you went with him contrary to instructions?

A. I didn't care.

Q. You knew as a salesman for that Company that he wasn't entitled to haul passengers?

A. Yes, sir.

Q. You knew on the evening of September 10, that he didn't have a right to haul you?

A. Yes, sir.

Q. And you didn't care anything about that?

A. I didn't care.

Q. Now, Mr. Rasmussen, did you tell his wife that he would be home late? A. Yes, sir.

Q. Did you tell her where you had seen him last? A. No.

Q. Why didn't you tell her the truth?

A. Mr. Hair asked me to tell his wife that he would be late and that is what I did.

Q. You knew why he was going to be late?

A. Yes, sir. [513]

Q. You knew that you were making misrepresentations to his wife didn't you?

(Testimony of C. A. Rasmussen.)

Mr. Merrill: Objected to as immaterial and also it is argumentative.

The Court: He may answer.

A. I knew he was going to be late if he got his work done.

Q. Will you answer the question.

Mr. Merrill: I suggest that he has answered.

The Court: The witness is now on cross examination.

A. Yes, sir.

Q. You will say that you were willing to help Hair mislead and fool his wife?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. Now, what was Mrs. Newby's condition, you say she was in bed? A. Yes, sir.

Q. Undressed? A. I don't know.

Q. Were the covers over her?

A. Yes, sir.

Q. Did you hear Mr. Hair's testimony? [514]

A. Yes, sir.

Q. You say that it isn't correct, that she was just lying on the bed, do you?

Mr. Merrill: Objected to as being argumentative.

Mr. Davis: I will withdraw it.

Q. You knew Hair's truck did you?

A. Yes, sir.

Q. How could you tell it was Hair's truck?

(Testimony of C. A. Rasmussen.)

A. By the signs on it.

Q. What kind of signs?

A. Camels and Prince Albert.

Q. Had you ever seen it in the street before?

A. Yes, sir.

Q. Setting in front of the hotels in different places?

A. Yes, sir.

Q. On the street at night?

A. Yes, sir.

Q. And in the daytime?

A. Yes, sir.

Q. Where did you say you were going after you were at the hotel?

A. I told him I was going to Pocatello.

Q. You came directly to Pocatello?

A. I worked the towns in.

Q. What towns?

A. I worked Grace and Bancroft. [515]

Q. Did you tell him you were going to Grace?

A. Yes, sir.

Q. Did you tell him when you were going to Grace?

X A. I think he knew that was my route.

Q. Did you expect to find him in Soda Springs?

A. No, sir.

Q. This man Higson, where is he?

A. I don't know.

Q. Do you know where he lives?

A. No, sir.

Q. Do you know what his name is?

A. No, sir.

Q. Do you know where he lives?

A. No.

(Testimony of C. A. Rasmussen.)

Q. Did you and Mr. Hair occupy adjoining cabins? A. Yes, sir.

Q. You could walk from one bedroom to the other? A. There was an adjoining bath.

Q. You could walk from one room to the other? A. Yes, sir.

Q. You and he customarily did that when you were out on the road? A. We had done it.

Q. How often before this?

A. Once or twice. [516]

Q. In other towns besides Montpelier?

A. I don't think so.

Q. Did you and Hair customarily go together in other towns on these trips?

A. We have been in towns together.

Q. Did you and he ever take any married woman to clubs before this time? A. No, sir.

Q. That is the only time you ever went out with one with him? A. Yes, sir.

Q. You thought it was all right to go up there?

A. It was all right for me to go with him?

Q. With Mr. Newby's wife?

A. I didn't go with her.

Q. You all four piled in the one seat of this truck to go to the Aero Club? A. Yes, sir.

Mr. Davis: That's all.

Mr. Merrill: That is all.

The Court: We will recess for ten minutes.

3:05 P. M., March 22, 1945.

Mr. Merrill: We will offer the deposition of Durwood Perkins. Mr. Smith will read the deposition.

The Court: Very well.

Mr. Smith: Is it necessary to read the [517] stipulation.

Mr. Davis: No, I will agree that it was taken pursuant to stipulation and it is agreeable with me to have the entire deposition read. I am familiar with it. You can start out with the testimony.

(Whereupon Mr. Smith read the following deposition.)

The above entitled matter came regularly on for hearing at room 506 of the Carlson Building, Pocatello, Idaho, on the 19th day of July, 1943, beginning at the hour of two o'clock P. M. of said day, for the taking of the deposition of Durwood Perkins, a witness called on behalf of the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, before R. D. Bistline, Deputy Clerk of the District Court of the County of Bannock, State of Idaho; Ben W. Davis, Esquire, of Pocatello, Idaho, appearing for the plaintiffs; and E. B. Smith, Esquire, of Boise, Idaho, and A. L. Merrill, Esquire, of Pocatello, Idaho, appearing for the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly; and Roy L. Black, Esquire, of Pocatello, Idaho, appearing for the defendant Rulon D. Hair, which deposition was taken pursuant

to stipulation for taking depositions hereto attached.

Mr. Smith: Let the record show, Mr. Reporter, that the witness Durwood Perkins is being called as a witness on behalf of the defendants R. J. Reynolds Tobacco [518] Tobacco Company and L. R. Donnelly.

DURWOOD PERKINS,

called as a witness on behalf of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Smith:

“Q. Will you state your name, please?

A. Durwood Perkins.

Q. And where do you reside, Mr. Perkins?

A. I live at Montpelier, Idaho.

Q. What is your age?

A. Eighteen years.”

Mr. Smith: Shall I read the remarks?

Mr. Davis: It isn't necessary so far as I am concerned. You can just go ahead and read the questions and answers.

“Q. Will you state whether or not you are subject to call in the military draft?

A. I will leave in the month of August, as near as I can tell now.

(Deposition of Durwood Perkins.)

Q. During the fore part of September, 1942, would you state where you worked or by whom you were employed?

A. I was employed by Joseph Burgoyne, and he owned, or had [519] leased, a service station and auto court.

Q. Where?

A. Montpelier, Idaho.

Q. As an employee of Mr. Burgoyne, would you state briefly your duties in that employment?

A. I came on work at six o'clock in the evening, and I worked from then until closing time. I watched the service station and cabins. I was there alone from nine o'clock in the evening until closing time.

Q. Now, during the fore part of September, 1942, would you state whether or not you knew, or had become acquainted with Rulon D. Hair?

A. Yes, I knew him on sight. I knew he was a Camel cigarette salesman.

Q. Where was he staying at the time you knew him, or became acquainted with him?

A. He was staying at the Burgoyne cottages. That is the auto court I work at.

Q. During the times he was staying at the Burgoyne cottages during the fore part of September, 1942, will you state whether or not you knew of some lady calling him by telephone?

A. Yes, I did. Do you want me to tell about it?

Q. No, not until I ask you. Will you now state the approximate time of day that the telephone con-

(Deposition of Durwood Perkins.)

versation came in, and who answered the telephone, what was said over [520] the phone and what you did.

Q. Well, the call came between seven and nine o'clock in the evening, and a lady called the service station and asked if I would call Mr. Hair to the phone, and I told her at that time I didn't know any Mr. Hair. She told me it was the Camel cigarette salesman, and asked me if I would call him to the phone, and I said I would, and I asked her if I should say who was calling and she said, "Just say Avenel is calling."

Q. Pursuant to that telephone call what did you do?

A. I went over and told Mr. Hair he was wanted on the telephone.

Q. Was there a telephone in the cottage in which Mr. Hair was staying? A. No, sir.

Q. Where was the telephone?

A. The telephone was in the service station.

Q. With reference to that service station, is that where you stayed most of the time?

A. Yes, sir, I stayed in the service station until I saw a car drive down to the cottages, then I went down there.

Q. When you told Mr. Hair about this telephone call, what did he do?

A. He came right over to the service station.

Q. And where were you when he came to the service station?

(Deposition of Durwood Perkins.)

A. Well, I was in there for just the first part of it.

Q. Did he answer the telephone? [521]

H. He said——

Q. (Interrupting) Just a minute, did he, or didn't he? A. Yes, sir.

Q. All right. Will you relate what you heard?

Mr. Davis: I will not urge the objection.

“Q. Mr. Smith (Continuing): When Mr. Hair answered the telephone will you state whether or not you heard him make any remark over the telephone? A. I did, yes, sir.

Q. Now, will you,—who else was preesnt there besides you and Mr. Hair, if anyone?

A. No one, to my knowledge. Once in a while there are a few people standing around in there, but——

Q. Now, will you state what you heard Mr. Hair say over the telephone?

Mr. Davis: I will withdraw, or rather not urge my objection.

“Q. Mr. Smith (Continuing): Go ahead now, and answer. A. Answer?

Q. Yes.

A. He said,—all I heard him say was, “Hello Avenel, how are you?” that is all I heard him say.

Q. Where did you go,—did you hear any more of the conversation?

A. No, I didn't. I had to leave. I was fixing a tire or [522] something out in the grease room, and I walked out of the station.

(Deposition of Durwood Perkins.)

Q. State if you know the occasion of an accident in which Mr. Hair was involved right about that time, or the next day?

A. I don't understand just what you want?

Q. Well, did you know of an accident in which Mr. Hair was involved? A. Yes, sir.

Q. About that time, or the next day?

A. The next day, yes, sir.

Q. The next day did you see Mr. Hair?

A. Yes, sir.

Q. Where?

A. He came into the station that evening after the accident. It was between ten and eleven o'clock in the evening.

Q. Between ten and eleven in the evening?

A. It was around there. I didn't pay much attention to the time.

Q. Did he make any remark to you?

A. Yes, sir.

Mr. Davis: I will waive my objection.

“Q. Mr. Smith (Continuing): When he came into the station between ten and eleven that evening, did he make any remark to you concerning any telephone calls he might receive? [523]

Mr. Davis: I will not urge that objection.

“Q. Mr. Smith (Continuing): And in such remarks did he give you, or suggest to you, any directions in case any telephone calls should come in?

Mr. Davis: I will not urge that.

“Q. Mr. Smith (Continuing): Now you can answer, Mr. Perkins. A. Answer?

(Deposition of Durwood Perkins.)

Q. Yes.

A. Well, he was expecting a phone call from Pocatello,—he come in and told me he was expecting a phone call, and told me to come and tell him, but to be diplomatic about it. That is just what he said.

Q. At that time did you know there had been an accident in which Mr. Hair and Mrs. Avenel Newby were involved?

Mr. Davis: You needn't read the remarks unless the Court wants it done.

The Court: Go ahead.

“Q. Mr. Smith (Continuing): When did you first know there had been an accident in which——

Mr. Smith: There was another interruption.

Mr. Davis: Go ahead with the questions and answers.

“Q. That there had been an accident,—the question being in the whole: When did you first know there had been an accident in which Hair and Avenel Newby were involved?

Mr. Davis: Go ahead with the answer. [524]

“A. I did know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I didn't know at the time Avenel Newby was with him, but he told me himself he rolled his truck over.

Q. Is that the only way you knew it, that he told you?

A. That is the only way I knew it.

Mr. Davis: I will not urge the motion.

Q. With reference to this conversation Mr. Hair

(Deposition of Durwood Perkins.)

had with you where he told you he rolled his truck over, was that the day before or the day after the time when he had this telephone conversation where you heard him remark something about "Avenel, is this you?"

Mr. Davis: Go ahead.

"Q Mr. Smith (Continuing): You may answer.

A. State the question again.

(Whereupon the question was read aloud by the reporter.)

A. It was the day after the telephone conversation.

Mr. Smith: That is all.

Mr. Black: No questions.

Mr. Davis: That is all. I have no cross examination."

Mr. Smith: That is all of the deposition.

L. R. DONNELLY,

recalled as a witness on the part of the defendants [525] having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name? A. L. R. Donnelly.

Q. You are one of the defendants in this case?

A. I am.

Testimony of L. R. Donnelly.)

Q. Where do you live?

A. Salt Lake City, Utah.

Q. How long have you lived there?

A. Seven years.

Q. What is your business or occupation?

A. Division Manager for the R. J. Reynolds Tobacco Company.

Q. How long have you been engaged in that business? A. Approximately fifteen years.

Q. Do you know Rulon D. Hair? A. I do.

Q. When did you first become acquainted with him?

A. When he first started to work for the company in 1937.

Q. Now, what was his occupation, or his duty for the company?

A. He was a salesman for the company, he called on the trade and called on jobbers, placed advertising, and we had consumer work to do.

Q. As such, during what period of time did he work for the Company?

A. He started to work in 1937. [526]

Q. How long did he continue working?

A. Until he had the accident in Montpelier, Idaho.

Q. When was he discharged?

A. September 12, 1942.

Q. Following the accident at Montpelier?

A. Yes, sir.

Q. By whom was he discharged?

A. Myself.

Testimony of L. R. Donnelly.)

Q. What are your powers with the Company as to hiring and discharging employees?

A. I have authority to discharge any employee, and I have authority to take an application but no authority to hire an employee.

Q. Did you hear of an accident in Montpelier in September 1942? A. I did.

Q. When did you get the information?

A. Early on the morning of the 12th of September.

Q. Where were you when you received the information? A. When I arrived home.

Q. At what place? A. Salt Lake City.

Q. By telephone or otherwise?

A. If I recall correctly Mr. Hair placed a call. I wasn't home and he informed my wife he had had an accident and [527] wanted to get in touch with me. When I arrived home I called Montpelier and was informed of the accident.

Q. What did you do?

A. I immediately got in my car and drove up to Montpelier.

Q. Where did you go? A. To Montpelier.

Q. When did you get to Montpelier?

A. Around noon the same day.

Q. What did you do,—first, what date did you arrive in Montpelier?

A. The 12th of September.

Q. The accident was on the afternoon of the 11th of September? A. Yes, that is correct.

Q. Who did you first see when you arrived in Montpelier? A. Mr. Hair.

Testimony of L. R. Donnelly.)

Q. Where did you find him?

A. The Burgoyne cabins.

Q. What did you do upon arrival and contact with Mr. Hair?

A. Asked him about the accident, how it happened and got his version of the accident and I got in my car and drove to the Montpelier Ford Garage to look over the wreck.

Q. At that time did he tell you there was a passenger in the car? A. He did not.

Q. When you went to the Ford Garage what did you do? [528]

A. I looked over the wrecked car, I didn't give it a complete examination. I then went to the police station and contacted the Sheriff. He had made an investigation. The Sheriff was not at the police station and the Chief of Police didn't know anything about the accident other than hearsay. I went back to the garage and made a more complete examination of the car.

Q. What did you find with respect to the car?

A. I found it completely wrecked. I would say about seventy-five per cent. The right front tire had blown out and had a three cornered gash in the center of the front right tire. The inner tube of the same tire was hanging out from the rim and it also had a six inch gash in it.

Q. After the examination of the car the second time what did you do?

A. I went from the garage to the cabins to make

Testimony of L. R. Donnelly.)

arrangements for a room that evening. Also to take the matter up further with Mr. Hair.

Q. While you were there at the filling station or the cabins did you see Mr. Hair,—strike that—while you were at the filling station or cabins did you see Mr. Newby and Mr. Tuescher?

A. While I was at the filling station Mr. Tuescher drove up and his brother drove up, I didn't know him at that time but I found out his name was Calvin, and later [529] Mr. Newby walked up.

Q. Did you have any conversation there with Mr. Russell Tuescher?

A. I was standing quite a little distance from the car being serviced and I heard Mr. Russell Tuescher remark to Mr. Hair "You are not going to leave town" and then I started to walk toward the car and I heard Mr. Russell Tuescher make the remark "The woman passenger in that car——" and I walked over then to Mr. Hair and said "My God, did you have a passenger?" That was the first I knew of it, and Mr. Hair admitted it.

Q. Was there any further conversation there at that time?

A. I asked Mr. Tuescher if he would be good enough to drive me to the hospital or the clinic where this lady was, I didn't know where it was, and he consented to drive me there. Mr. Russell Tuescher, Calvin and myself drove to the hospital.

Q. How long did you remain at the hospital?

A. Not very long. I inquired as to the condi-

Testimony of L. R. Donnelly.)

tion of the young lady and I was told and that was the extent of the visit.

Q. Did the three of you leave the hospital together?

A. As I recall now Mr. Tuescher and myself were the only ones that went to the hospital.

Q. Did you have any further conversation with either of the Tueschers at that time? [530]

A. On the road down to the hospital I asked Mr. Russell Tuescher his version of the accident and he told me.

Q. What did he say?

Mr. Davis: Was Mr. Newby there at that time?

Mr. Merrill: I don't think he was but they went into the conversation with Mr. Tuescher.

Mr. Davis: I have no objection to this witness denying the conversation.

The Court: Well, you may answer.

Q. Mr. Russell Tuescher on coming from the filling station to the hospital, I inquired as to his version of the accident and also I inquired who the lady was and he informed me it was his sister. He said that Mr. Hair and his sister had been out——

Mr. Davis: Now, just a minute. I shall object to any further conversation of this witness if Mr. Newby was not present. They did not lay the foundation by way of cross examination of Russell Tuescher. This witness cannot testify as to any conversation when Mr. Newby was not there.

Mr. Merrill: I think it was testified to.

The Court: My recollection is that Mr. Tuescher

Testimony of L. R. Donnelly.)

testified to the conversation with Mr. Donnelly and now, I understand that counsel is asking him for that conversation. [531]

Mr. Davis: It is my contention that he has a right to deny any statement of Tuescher's but if he is going on to make another statement that Mr. Tuescher is supposed to have said when Mr. Newby was not there, then the foundation has not been laid.

Mr. Merrill: When they purport to put in a conversation we have a right to put in our version of that conversation.

The Court: I will let him answer.

A. On the road to the hospital I got his version of the accident. On the way down I was informed that the lady that was in the accident was his sister and Mr. Hair had been out on a party with his sister and the car turned over and she was seriously injured.

Q. What did he say as to when she went out on the party?

A. He didn't say anything at that time, we arrived at the hospital about then.

Q. Now, who was present at the time you said you were advised by Russell Tuescher that Mr. Hair had been out with Mrs. Newby on the night of the accident?

A. I just related the conversation from the filling station to the hospital.

Q. When you got back, when you left the hos-

Testimony of L. R. Donnelly.)

pital and started toward the car was there any further conversation?

A. When Mr. Russell Tuescher and myself were leaving the [532] hospital,—the hospital was on the second floor and on the street below we came across Mr. Newby. Mr. Newby inquired of his wife's condition, whether I thought she was going to have a chance, and I informed Mr. Newby that I thought she had a fifty-fifty chance of recovery. I told Mr. Newby that it was necessary to leave town, that I had finished my investigation and there was nothing more I could do. That Mr. Hair and myself would have to get to Pocatello and check in the merchandise that was in the car and I would like his permission to leave.

Q. What was said?

A. He didn't want us to leave and I told him if it would make him feel any better I would go to the Sheriff's office and guarantee the appearance of Mr. Hair at any future date.

Q. Where?

A. At Montpelier, at the Sheriff's request.

Q. Continue with the conversation.

A. We went over to the police station and I contacted the Sheriff for the first time. I presented my card to the Sheriff and made myself known, who I was and my purpose in being there, that I wanted his permission for Mr. Hair and myself to leave town and I asked the Sheriff his version of the accident, I asked if he had been out to the scene of the accident and he said he had.

Testimony of L. R. Donnelly.)

I [533] told him that Mr. Hair had informed me as to how the accident had happened and I wanted to see if that was the case. I wanted his opinion. The Sheriff said that it appeared to him that the Tobacco Company car was going south toward Montpelier and for some reason it was crowded off the highway,—off the oil road and had gone along for some distance, and apparently it had struck some sharp object and the right front tire had blown out, and the car was then apparently thrown out of control.

Q. Was that what the Sheriff told you?

A. Yes, sir.

Q. Go ahead if there is anything further.

A. I asked the Sheriff if it was possible that this car was crowded off the highway as Mr. Hair stated and he said that it was possible that it had.

Q. Was there anything further in that conversation with the Sheriff?

A. Not that I recall now.

Q. Did you have any further conversation with the Tueschers?

A. Yes, after leaving the police station and going toward the Burgoyne cabins I had quite a conversation with Russell Tuescher who seemed to be fairly clear headed. I inquired of Mr. Tuescher if he was employed and he informed me that he was working for the railroad and [534] the conversation led back to the accident. He informed me that his sister had been over to his house on the evening of the 10th and said she had met a good

Testimony of L. R. Donnelly.)

looking tobacco salesman and she told Russell that she was going out for a good time. He said that he reprimanded his sister and tried to persuade her not to go, that it wasn't the right thing to do. He also informed me that his mother had had quite a lot of trouble with his sister——

Mr. Davis: Now, if the Court please, the last part of the statement was not testified to, there is not a word in this record about any such statement.

The Court: I don't think he touched on anything his mother told him. And I don't think you asked anything about what the mother said.

Q. Now, Mr. Donnelly, who was there at the time you were talking to Mr. Tuescher?

A. Mr. Tuescher and myself.

Q. Was there anything said further about a job or was that at some other time and some other conversation?

A. Nothing other than just like I said, I asked if he was employed and he said he was by some railroad company.

Q. Then what was said?

A. I started to say——

Q. Just a minute,—did you tell him there at that time that you were offering him a job? [535]

A. I never offered Mr. Russell Tuescher a job.

Q. Did you say that you wanted to hire him?

A. That is impossible, I haven't that authority.

Q. Did you say that? A. No, sir.

Q. Was anything said or any comment made about a lawyer or any litigation?

Testimony of L. R. Donnelly.)

A. Not at all.

Q. Did you hear Russell Tuescher's testimony touching on that? A. I did.

Q. What is the fact as to whether there was a conversation between you and Russell Tuescher or anyone else touching any form of litigation, the rights of the parties, or the supposed rights of the parties, or about lawyers or anything else?

A. There is no question about that, it wasn't even brought up.

Q. Was there anything said about corporations or about the R. J. Reynolds Tobacco Company being a strong corporation? A. No, sir.

Q. Was there anything said about shyster lawyers? A. No, sir.

Q. Any such comment made at all?

A. No, sir, not at all.

Q. Did you have any further conversation with these people?

A. Not that I remember of. [536]

Q. At that time? A. No, sir.

Q. What did you do then?

A. After getting permission from the Sheriff to leave town, I don't recall whether I had the tobacco loaded on my car before that time, if it wasn't then it was loaded at that time and we drove,—Mr. Hair and myself drove to Pocatello.

Q. During any of these conversations was there anything said about firing Hair?

A. Yes, sir, Mr. Hair was dismissed immedi-

Testimony of L. R. Donnelly.)

ately after I found out that he was carrying a passenger.

Q. When you had the conversation with Mr. Tuescher did you make any comment that he was discharged? A. I don't think I needed to.

Q. Did you make any such comment?

A. No, sir.

Q. Now did you go out to the scene of the accident?

A. I didn't at that time because the car had been hauled in to Montpelier and I contacted the Sheriff; on the way back to Pocatello Mr. Hair went in his personal car and so I didn't.

Q. Back from Montpelier to where?

A. To Pocatello.

Q. How did he get his personal car? [537]

A. His wife drove it down. I tried to find the place of the accident from the Sheriff's description but I couldn't find it.

Q. What were the restrictions on the part of the Company with respect to the use of Company trucks?

Mr. Davis: We object to this as repetition, this witness testified to all this very fully.

The Court: Yes, it is all in the record, but if Mr. Merrill wants to put it in again, I suppose he may do so.

Q. What information, if any, did you have of Mr. Hair violating any instructions of the company in regard to hauling passengers?

A. I knew of the case in Pocatello when he had

Testimony of L. R. Donnelly.)

a passenger, his wife, and a man by the name of Eckersley.

Q. When was that?

A. Some time in 1939.

Q. Was it on the same day that he had these two passengers? A. Yes, sir.

Q. What did you do with reference to that?

A. His superior officer took him to the hotel and we sat him down with his wife and explained thoroughly the conditions under which he would be permitted to continue with the company and very emphatically made it plain that he was not to haul any more guests, including his wife, in the company car at any time. I am sure that he under- [538] stood the instructions.

Q. What did you tell him you would do if he carried any guests?

A. Immediately dismiss him from the company employ.

Q. Did you know of his carrying any guests prior to that time? A. I did.

Q. Did you ever hear or have any information at all, of Mr. Hair carrying any guests from that time until the Newby case?

A. Not at all, no, sir.

Q. What was his driving record over that period of time?

A. If he had any guests in the car I couldn't have learned of it.

Q. And what if you would have learned that he had guests in the company car?

Testimony of L. R. Donnelly.)

A. I would have dismissed him immediately.

Q. How often do you get reports from salesmen? A. Every day.

Q. Now, Mr. Donnelly, did you ever hear of any incident supposed to have been in Dubois, Clark County, Idaho, prior to September 1942, where he had a guest in the car?

A. Only here in the court room.

Q. Did you ever hear of it under any other circumstances? A. I have not.

Q. Have you during the period of time that Mr. Hair was in [539] the employ of the Company—did you make trips around through the territory which he served?

A. Yes, sir, periodical trips.

Q. Periodical trips?

A. Yes, sir, I had quite a large territory to cover and I endeavored to get somewhere in his assignment once a month. Usually it was in Pocatello.

Q. During that time did you call on your dealers? A. Yes, sir.

Q. Did you hear any complaint about Mr. Hair?

A. No, sir, it was to the contrary.

Q. What did you hear?

A. That he was well liked and was doing a nice job of serving the dealers.

Q. Did you hear any complaint of any kind or character touching his method of driving an automobile? A. Not at all.

Q. Did you ever hear anything about his being

Testimony of L. R. Donnelly.)

drunk, aside from what was said in the Myers case here? A. I did not.

Q. Did you know he used intoxicants?

A. I wouldn't know.

Q. Did you ever see him when you thought he had been using them? A. I did not. [540]

Q. Did you ever have any evidence of any use of it in any contact with him? A. No, sir.

Q. Did you ever have any evidence of incompetency in the use of automobiles by Mr. Hair?

A. No, sir.

Q. What was the expense of his car in respect to the other cars driven by other drivers for the company?

A. Not out of line. When a car gets old the expense is higher.

Q. Now, Mr. Donnelly, some comment was made about a trip to Pond's resort?

Mr. Davis: I think that was gone into.

Mr. Merrill: There was an inference that there was something wrong with this trip.

Mr. Davis: I never made such an inference.

The Court: Go ahead, we will save time in clearing this up.

Q. What were the circumstances of the trip?

A. In July we have our vacation. Mr. Hair and a gentleman by the name of Hamer and his wife and myself and wife, Mr. Hair and his wife and my youngster. We drove to Ponds on a vacation trip in our personal cars, and by the way,—it was my wife and Mr. Hair's wife.

Testimony of L. R. Donnelly.)

Q. Did Hair have a car of his own?

A. Yes, sir. [541]

Q. Was it that car that was used at Pond's?

A. Yes, sir.

Q. Do you know R. D. McKenzie?

A. I know that he is an official of the R. J. Reynolds Tobacco Company. I don't know him personally.

Q. He is one of the signers of the card from the National Safety Council?

A. That is correct.

Q. That was delivered to Mr. Hair?

A. Yes, sir.

ports to the National Safety Council concerning

Cross Examination

By Mr. Davis:

Q. Mr. McKenzie is the man who made the reports to the National Safety Council concerning Mr. Hair and his activity as a driver?

A. I wouldn't know.

Q. You made trips periodically over that territory after the Myers incident in 1939?

A. That's right.

Q. On these trips you inquired of people and endeavored to find out what Mr. Hair's reputation was for driving?

A. That is correct.

Q. Did you make inquiry in Pocatello?

A. Yes, sir.

Q. Did you make inquiry in Clark County?

A. Not that I remember.

Q. Did you make any inquiry of Mr. Pugmire, the Chief of Police in Pocatello?

Testimony of L. R. Donnelly.)

A. I could have.

Q. You could have made inquiry of Mr. Pugmire after the Myers incident in 1939?

A. I didn't.

Q. I thought you said you could have?

A. But you didn't ask as to any dates before.

Q. Did you make any inquiry over a period of years?

A. I possibly have, not only this salesman but others.

Q. Did you make inquiry about this salesman over a period of years in which he worked for you?

Q. Any of those inquiries were after April 1939?

A. I wouldn't remember.

Q. Any of those inquiries were after April 1939? That is, if there were any inquiries?

A. Possibly before or after.

Q. You would not have occasion to make any prior to 1939?

A. Yes, sir, we constantly try to keep in touch.

Q. You constantly try to find out what their reputation as drivers is? A. That is correct.

Q. You did that in this case?

A. Yes, I do in every case.

Q. You took issue with the police over whether or not your [543] driver was intoxicated in 1939?

Mr. Merrill: This matter was gone into in their part of the case.

The Court: Yes, that is true, but I think I allowed you to go into matters that had been covered.

Mr. Davis: I will withdraw that.

Q. Mr. Donnelly, after Mr. Hair's conviction in

Testimony of L. R. Donnelly.)

Pocatello did you ever on your trips back here inquire of Mr. Pugmire as to how Mr. Hair was doing and what his reputation was?

A. I inquired but I don't know that I inquired of Mr. Pugmire.

Q. You inquired of the officers?

A. Possibly I did.

Q. You found nothing derogatory about his reputation? A. I don't remember that I did.

Q. You would remember it if you had been given any such information? A. I think so.

Q. You would have dismissed him if you had found any such information?

A. I would have dismissed him.

Mr. Davis: That's all.

Mr. Merrill: That is all. I think we rest at this time. [544]

The Court: Do you have any rebuttal.

Mr. Davis: Just a few questions.

MR. GEORGE NEWBY,

being recalled in rebuttal, as a witness on the part of the plaintiffs, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Newby, I am calling your attention to the testimony of Mr. Jack Perkins, the manager of the apartment house. A. Yes, sir.

(Testimony of George Newby.)

Q. Testimony was given that a notice was served upon you to vacate? A. Yes, sir.

Q. Did he advise you of the reasons for the service of the notice? A. Yes, sir.

Q. What did he say?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial, and it is not the best evidence.

The Court: He may answer.

A. I asked why he wanted us to vacate and he said that Russell Tuescher's kids and my kids got to playing in the hall and there were railroad men living there that had to sleep in the daytime because they worked at [545] night and they made too much noise.

Mr. Davis: That's all.

Mr. Merrill: No questions.

The Court: We had a witness here who was compelled to leave the city and counsel stipulated that he might be put on the stand and sworn and his testimony taken and at this time the Reporter might read that testimony to you ladies and gentlemen of the jury, and if you will listen the Court Reporter will read that testimony to the jury.

(Whereupon the following testimony was read by the Reporter.)

F. M. WILLIAMS

being called as witness in rebuttal on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. F. M. Williams.

Q. Where do you live?

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Twenty-nine years next May. [546]

Q. Mr. Williams, are you well acquainted in your community? A. Yes, sir.

Q. What is your business? A. Merchant.

Q. Do you hold any official position or act in any official capacity at the present time?

A. What do you mean?

Q. Are you a member of the State Legislature?

A. I am a senator in the State Legislature.

Q. Had you known Avenal Newby in her lifetime? A. Yes, sir.

Q. How long prior to her death had you known her?

A. Ever since she was a child, twenty years or more.

Q. Are you related to the Tueschers or to Mr. Newby? A. No, sir.

Q. Were you well acquainted with her in the community in which she and you resided?

(Testimony of F. M. Williams.)

A. Yes, sir.

Q. I will ask you if you knew her general reputation as to being a person of good moral character?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid.

The Court: He may answer.

A. Yes, sir. [547]

Q. What was that reputation, good or bad.

Mr. Merrill: The same objection.

The Court: He may answer.

A. Good so far as I know.

Q. Did you know her general reputation as to her general character? A. Yes, sir.

Q. Was it good or bad?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and no proper foundation has been laid.

The Court: He may answer.

A. Good as far as I know.

Mr. Davis: That is all.

Cross Examination

By Mr. Merrill:

Q. You have lived in Montpelier for some time?

A. Yes, sir.

Q. You mean by your testimony that you haven't heard anything said, you haven't heard her character discussed? A. No, sir, I haven't.

(Testimony of F. M. Williams.)

Q. You haven't heard her character for chastity or morality discussed by anybody?

A. No, I don't think so.

Q. You haven't heard her general character discussed by anyone in the community? [548]

A. No.

Q. You just know that she was a lady living there and you hadn't heard anything about her?

A. No, I hadn't.

Q. That is the entire substance of your testimony? A. Yes, sir.

Mr. Merrill: That's all.

Mr. Davis: That is our case.

Mr. Merrill: Now I move that the entire testimony of the witness be stricken upon the ground and for the reason that there is no foundation of any kind or character shown upon which any conclusion given by the witness could be predicated.

The Court: My understanding in matters of this kind is that when a witness is asked as to the reputation of a person, then counsel has a right to examine as to his qualifications to answer, but that when he has been asked and answers, and **then** counsel cross-examines, and the witness may give statements that seem contrary or to indicate that he was not familiar with the reputation about which he testifies, then it becomes a question of the weight of the testimony and that is for the jury. However, I will reserve my ruling on the motion to strike at this time.

Mr. Merrill: We made some motions at the conclusion of the plaintiffs' case.

The Court: I understand that both sides rest.

Mr. Merrill: Defendants have rested.

Mr. Davis: And so have the plaintiffs.

Mr. Merrill: There were some motions made at the conclusion of the plaintiffs' evidence so far as I know they were not ruled upon.

The Court: No. I thought you were in a hurry to get on with the case.

Mr. Merrill: Yes, I understand. And now these matters are in a measure a restatement of those motions with one or two other matters:

Comes now the defendants Donnelly and the Reynolds Tobacco Company and move the Court for a directed verdict in favor of the defendants upon the grounds and for the reasons that the evidence is insufficient in law to justify the submission of this cause to the jury, and more particularly as follows, to-wit:

That the evidence shows without substantial conflict that at the time the accident occurred and for approximately eighteen hours theretofore that the said Rulon D. Hair was not acting as the agent of said defendants or either of them, and was not within the scope of his employment, nor doing anything within his scope to further the business of his master but was entirely upon a pleasure party of his own and at the time of the accident he was transporting the deceased Avenel Newby with him as a [550] guest to her home in Montpelier, Idaho.

2. That the evidence conclusively shows that Avenel Newby was riding in the automobile as a

guest of Rulon D. Hair, which automobile was owned by the R. J. Reynolds Tobacco Company and the said Rulon D. Hair had no authority of any kind or character from either the said R. J. Reynolds Tobacco Company or L. R. Donnelly, to haul guests in the said car but had positive oral and written instructions that under no circumstances was he permitted to haul guests in the said car, and that no one should be transported by him in such car other than an employee or officer of the company, and that this automobile was used in violation of these instructions and that the evidence is wholly and completely insufficient in law to show any waiver of these instructions on the part of either said L. R. Donnelly, or the R. J. Reynolds Tobacco Company.

3. That the evidence fails to show that at the time of the said accident Rulon D. Hair was in anywise guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of the rights of Avenel Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage, and that he was not guilty of any such negligence required by the guest [551] statute at the time of the said accident.

4. That the evidence wholly and completely fails to show that the said Rulon D. Hair was a careless, reckless, drunken and incompetent driver or that he was habitually negligent and that the one accident which may have occurred in Pocatello in 1939 is wholly and completely insufficient as a

matter of law, to establish the status of incompetency on the part of the driver.

Further the said defendants move that in the event that the motion of nonsuit be denied, that the—strike that, please—The defendants move that in the event the motion of nonsuit be denied then the defendants urge that their motion for directed verdict be granted upon the question raised by their motion regarding paragraph number seven of the amended complaint wherein it is charged or attempted to be charged that the said Rulon D. Hair was permitted to use the truck of the defendants when it is alleged that they knew him to be a careless, reckless, drunken and incompetent driver and attempted to charge negligence upon the part of these defendants in such manner; upon the ground and for the reason that the evidence is wholly and completely insufficient and wholly and completely fails to show as a matter of law that there is any incompetence or negligence shown in the use of automobiles as an habitual matter but that [552] said allegations are in nowise supported or proved by the evidence and that if any such existed, no such evidence of any such status ever came to the knowledge of the defendants or either of them.

It is further moved that if this motion be granted then that all that proof of the said proceedings in this case be removed from the jury by proper instructions and that the evidence attempting to bear thereon be stricken from the record.

May I add to the first motion that the evidence

wholly and completely fails to show that at the time of the accident when Avenel Newby was a guest in said automobile that the said Rulon D. Hair was acting within the scope of his employment but on the contrary the evidence conclusively shows that he was not so acting.

There are other matters I have attempted to raise by instructions I have handed to Your Honor as to the statutes and the defense here. These matters are sufficiently presented, I assume.

Mr. Davis: Comes now the plaintiffs and request the Court to instruct the jury to return a verdict for the plaintiffs in conformance with the prayer of the complaint.

The Court: I am satisfied that this case should be submitted to the jury except as to the amended part of the complaint, without any reference to the [553] former judgment as to Hair, but I am inclined to think that the one allegation as to the employment of Mr. Hair knowing him to be a reckless, drunken and incompetent driver should not be submitted to the jury. That is my impression now, and I would like to hear counsel on that point. I will hear you in the morning on that matter.

We will recess until 10 A. M.

10 A. M. March 23, 1945.

The Court: The record may show that the motion to strike the testimony of Mr. Pugmire is denied and also that the motion to strike the testimony of the witness F. M. Williams is denied.

(Argument of counsel heard by Court on Motions.)

The Court: I think, under the rules, I will withhold ruling on the motions at this time and submit the matter to the jury, and it can all be raised again, or the Court can consider it further.

I think we will adjourn now until two this afternoon and at that time I will ask the Bailiffs to have the jury back for their instructions.

2 P. M. March 23, 1945.

The Court: The record may show that the motions for nonsuit and motion for directed verdict on the part of plaintiff and defendants are denied.

(Arguments to the Jury.)

INSTRUCTIONS

The Court: Ladies and Gentlemen of the Jury: You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistake in the instructions may be corrected but it is not the province of the jury to undertake to correct the mistakes of law which the Court may make, and for the purpose of

your deliberations the instructions must be accepted as the law of the case.

The issues in this case are made up by the amended complaint of the plaintiffs and the answer of the defendants. These issues have been explained to you quite fully by counsel for the respective parties during the trial and the arguments made to you, and you will be permitted to take the pleadings to the jury room with you so I do not think it necessary to say anything further to you in regard to them, except that you may refer to them for any assistance they may be to you during your deliberations. I will also say that you must not consider them as evidence in any sense, they are merely to advise you of the claims made by the respective parties. [555]

In passing upon the issues in this case the burden is upon him who asserts the existence of a fact to establish it, and in civil actions of this character to establish it by a preponderance of the evidence. The burden therefore is upon the plaintiff in the first instance to show by a preponderance of the evidence the cause of action set forth in his complaint, and in determining the credibility to be given to the testimony of any witness you have the right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness had told the truth. Preponderance of the evidence does not necessarily mean the greater number of

witnesses. It means the greater weight of the testimony or evidence before you taken as a whole. This is the meaning of preponderance as accepted in the law.

It is your duty, Ladies and Gentlemen, to follow these instructions in good faith, and to try to apply them to the evidence fairly and impartially, entirely apart from any consideration except the facts in the case; and conscientiously and impartially render a verdict. The fact that one party is a corporation and the other a natural person you must disregard, for both are equal before the law.

You are the sole judges of the facts and you must determine what the facts are from the evidence introduced and from the circumstances which have been introduced and detailed by the witnesses. That being your responsibility, it is also your right and duty to determine and to pass upon the credibility of the witnesses and the weight to be given to their testimony. You will consider the interest which the witnesses have in the result of the trial, and all other facts and circumstances which in common experience of life you have learned, bear upon human testimony and tend to make it truthful and reliable, or upon the other hand, tend to distort or color it.

You are instructed, that in the title of this case and elsewhere in the pleadings, Rulon D. Hair appears as a defendant against whom judgment is sought by the plaintiffs, along with the other defendants, yet the Court advises you that your consideration in this matter is as to the controversy

between the plaintiffs and the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and any impression you may have received from any facts called to your attention in regard to any former trial of this action should be totally ignored by you, and you should not allow it to enter into your deliberations in any way. [557]

You are instructed that if you believe that R. D. Hair, who has been mentioned many times during the trial of this case as the driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.

You are instructed that Section 48-908 Idaho Code annotated as amended by Chapter 160 of the Idaho Session Law of 1939 provides as follows:

“Liability of Motor Owner to Guest.—No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against

such owner or operator for [558] injuries, death or loss in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.”

In this case it is alleged by the plaintiffs and admitted by the defendants that Avenel Newby was riding in the automobile being driven by Rulon D. Hair as a gratuitous guest and accordingly, the statute quoted to you has full application to the facts in this case.

You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless, drunken and incompetent driver on the date of the accident, and, secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence in retaining the [559] servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his

position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendants they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment.

The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is [560] further provided in the State statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.

You are instructed that a servant may be pre-

sumed prima facie to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master's business.

You are further instructed that when Hair took possession of the panel truck it was with the definite agreement that he would not haul guests in said automobile. It is admitted that Avenel Newby was a guest. If, under such circumstances Hair did haul a guest in the car he would be acting outside the scope of his employment and his employers could not be liable for any injury that may have occurred to said guest. However, you are also instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942 disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the [561] R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was

acting contrary to instructions and outside the scope of his authority in hauling a guest.

You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenel Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenel Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenel Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues.

You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant R. J. Reynolds Tobacco Company, and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as Division manager, and you are instructed that any notice to [562] L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, as he was their duly authorized division manager and agent.

You are further instructed, that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace of the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of per-

sons, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having known any such reputation of Hair unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant, and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair; further an opinion of a small group of persons, if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man, nor be sufficient to create a reputation.

You are instructed that an employer in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which the [563] employee is engaged.

You are instructed that it is alleged by the plaintiffs that the defendants Donnelly and Reynolds Tobacco Company intrusted the panel truck to Hair, knowing that Hair was a careless, reckless, drunken and incompetent driver and you are instructed that if you find said allegations to have been proven and if you are satisfied by a preponderance of the evidence that said Rulon D. Hair was a careless, reckless, drunken and incompetent driver and that such fact was known by his employer or employers and the owner of said truck; then his employer and owner of said panel truck would be liable for the acts of said Hair, in reckless disregard of the

rights of others, regardless of whether he was acting within the scope of his authority or on his master's or employer's business.

You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during the ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon D. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident, contained property [564] and products of the R. J. Reynolds Tobacco Company and had advertising matter therein of said Company, carried for sale and advertisement by the said Rulon D. Hair in said panel truck, and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment.

In this case it is contended that Rulon D. Hair drove and operated the automobile with reckless disregard to the rights of Avenel Newby. The phrase or term "reckless disregard" as used in the guest statute quoted to you means an act destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; without thought or care for consequences.

You are instructed that there is a presumption

that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case that the said Rulon D. Hair, at the time of the accident was using an automobile which was owned by the R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of the defendants, but was being used by the said [565] Rulon D. Hair for his own personal business or pleasure, then and in that event the said defendants would not be liable for any damage caused by the use of the said automobile by the said Rulon D. Hair.

You are instructed, that there has been evidence introduced in this cause touching an action in which Rulon D. Hair was involved in Pocatello, Idaho, in April, 1939, and certain litigation which resulted from that accident. The only purpose for which such evidence was admitted was upon the question of whether or not the R. J. Reynolds Tobacco Company and L. R. Donnelly knew of said action and whether or not such knowledge, if they had it, could be considered as a waiver of their instructions against Hair hauling guests and you should not consider any of this evidence as bearing upon any of the other issues in this case.

The depositions read to you in this case are the testimony of witnesses who were unable to attend the trial of this case, and were taken in the manner provided by law and under oath, the testimony of such witness as contained in such depositions is entitled to the same consideration and weight as

though the witness was present in person and testifying orally in the Court room. [566]

You are instructed that the plaintiffs in this case cannot recover against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, or either of them, unless you believe from the evidence and from these instructions that Avenel Newby, deceased, could have recovered against both or either of said defendants had she not been killed, but only injured. In other words, the rights of these plaintiffs are no greater than the rights of Avenel Newby would have been had she survived the accident.

You are not bound by the testimony of any witness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience, good judgment and common sense.

I think I should tell you also, that you should not single out any particular statement I may have made in giving you these instructions, but they should be considered as a whole,—as an entire charge.

You have already been advised or will observe that this action is one on behalf of George H. Newby, the husband of Avenel Newby, deceased, in his own behalf, and also on behalf of Richard Arlen Newby and Patty Ann Newby, both minors, and children of the deceased. Avenell Newby, who are [567] represented by their guardian ad litem, their father, George H. Newby, and you are instructed that if you find that the plaintiffs are entitled to

damages, and if you return a verdict in favor of the plaintiffs, that your verdict should be in a lump sum and that any amount, if allowed, will be apportioned to the father and the minors by the Court in such manner or such amounts as to the Court seems proper.

Now, Ladies and Gentlemen, if you find in favor of the plaintiffs and come to consider the damages which you will award, there is no precise measure or guide. The question is necessarily committed to the good sense of twelve persons such as you are, acting as jurors. Any damage allowed should be such, as under all the circumstances of the case will be just. In considering the amount, however, you may take into consideration the age and condition of the deceased Avenel Newby.

You are permitted to take into consideration such loss of companionship and society, if any, which the plaintiffs might have enjoyed. You may also consider such future earnings of the deceased, if any, which might have been received by the plaintiffs. You may also consider the amount that the plaintiffs have necessarily paid out or incurred by reason of the expense of physicians, hospital and funeral expense. [568]

You are to consider this question as you consider other questions in the case, dispassionately and fairly, with the purpose in good faith to award such reasonable damages as the plaintiffs have suffered. The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint.

However, in a case of this kind damages cannot be allowed for grief and mental suffering of the plaintiffs which may have been occasioned by the death of Avenell Newby.

You have heard the witnesses, seen the exhibits, listened to the arguments of counsel and the instructions of the Court, you may take with you, when you retire, the exhibits which have been admitted and you may refer to them for such assistance as they may give. You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record.

And finally, I think I should also say to you that you should not, in arriving at a verdict, if you conclude that damages should be awarded, add together the several different amounts representing the respective views of jurors and then divide the total by twelve or by some other figure intended to represent the number of jurors or ideas represented. This would be a quotient verdict and [569] of course, would be contrary to your oath. You are, of course, to give serious consideration to each other's view and reasoning, in an honest endeavor to reach a common agreement, but such agreement is to be based upon the final beliefs of the jurors and should not be arrived at by that mechanical device of addition and division which constitute a quotient verdict.

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdicts have been prepared

for you and you will have no difficulty in using them. If you find for the plaintiffs and against the defendants, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to. If you find for the defendants and against the plaintiffs, then you will use the verdict prepared for that purpose in which there is no blank space left.

By way of further explanation of the verdicts that it is your province to return, you may return a joint verdict if you so desire; that is, you may find in favor of the plaintiffs and assess damages against both the defendants jointly, or you may find in favor of both the defendants and against the plaintiffs, or you may find for the plaintiffs and assess the damages against either [570] defendant separately,—you may find in favor of the plaintiffs and against one of the defendants, and in favor of one of the defendants and against the plaintiffs.

When you retire to your jury room you may elect one of your number as foreman, and when you arrive at a verdict your foreman alone need sign the verdict and it will then be returned into open Court.

After the Bailiffs are sworn, you will retire to consider your verdict.

(After consultation of Counsel and Court at the Bench, the following instruction was given:)

Ladies and Gentlemen, so that there will be no misunderstanding: If your verdict is in favor of

the plaintiffs, you could find against the defendants jointly or you could find against one defendant and not against the other defendant. However, you cannot apportion the verdict between the two defendants. The verdict must be against both jointly or against one.

Mr. Merrill: Comes now the defendants L. R. Donnelly and R. J. Reynolds Tobacco Company before the jury has retired and objects and excepts to these certain instructions given by the Court more particularly as follows: "You are instructed that if you believe that R. D. Hair who has been mentioned many times during the trial of this case as the [571] driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendant R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or, that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly."

"You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile, knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you

to find from a preponderance of the evidence, first, that Rulon D. Hair was a careless, reckless, drunken and incompetent driver; and on the date of the accident, and secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence [572] in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendant they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment," and

"You are further instructed, that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace in the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of persons, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having

known any such reputation of Hair, unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant, and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair; further, an opinion of a small group of persons, if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man, nor be sufficient to create a reputation." Upon the ground and for the reason that the [573] same deals with an issue upon which there is no competent or sufficient evidence justifying the submission of the said matter to the jury.

Defendants object and except to the certain instruction given to the jury, reading as follows: "You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile." Upon the ground and for the reason that the same is too limited in its wording and does not contain the necessary limitations with respect to the facts and circumstances touching the issues respecting said automobile.

Defendants object and except to that certain instruction given to the jury, reading as follows: "The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a

manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided [574] that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities." Upon the ground and for the reason that the said instruction is based upon a statute covering ordinary negligence in which automobiles are involved and does not have application in the instant case or to any case where the guest statute is involved and that the said instruction would tend to mislead and confuse the jury into considering a case in which this law is involved rather than cases involving the guest statute.

The defendants object to that certain instruction given to the jury, reading as follows: "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company that the deceased Avenel Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair,

then the defendants are liable if the accident resulting in the death of Avenel Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenel Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues. Upon the ground and for the reason that said instruction does not cover the pleadings and the [575] facts in this case, particularly in that there is no allegation that the said Rulon D. Hair was intoxicated at the time of the accident and intoxication is not pleaded as a ground for recovery under the guest law and as such could not be the proximate cause of the death of Avenel Newby, and is addressed to an issue which is not properly involved in this case in that the question of the status of Rulon D. Hair as a driver is not properly before the Court on an issue attempting to bind his employers.

The defendants object and except to the giving of that portion of a certain instruction given to the jury and reading as follows: "The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint." Upon the ground and for the reason that the plaintiffs in this case should not be allowed to recover more than \$7500. the same being the amount heretofore awarded against R. D. Hair as the agent, servant and employee of said defendant and that

the jury should be so instructed with their instruction on damages.

Comes now the defendants and object to the refusal on the part of the Court to give defendants requested instruction number 11, reading as follows: "You are instructed that in respect to the issue as to damages, if you come to consider that issue, the Court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of \$7500." For [576] the reason that this case has heretofore been tried before a jury as against these defendants and R. D. Hair as agent, servant and employee of said defendants with a joint verdict having been rendered of \$7500. from which judgment the defendants Tobacco Company and Donnelly appealed to the Circuit Court of Appeals, and R. D. Hair did not appeal, and that the said Circuit Court of Appeals reversed the judgment as to the defendants Tobacco Company and Donnelly and remanded the matter for a new trial and a new trial has been had against the last named defendants and that the amount heretofore awarded against the said R. D. Hair servant, agent and employee of the Reynolds Tobacco Company and Donnelly fixes the maximum amount for which any judgment could be rendered in this case.

The defendants object and except to the refusal of the Court to give defendants' requested instruction numbered 12 and reading as follows: "You are instructed that this cause has heretofore been tried and a verdict rendered against all of said

defendant in the sum of \$7500. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the appellate Court. Rulon D. Hair did not appeal. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The Judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide [577] this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must decide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of \$7500. This does not mean that the verdict, if you find against said defendant, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of \$7500." Upon the

same grounds and for the same reasons as set out in the objection and exception to the refusal to give instruction number 11.

Defendants object and except to the refusal of the Court to give defendants' requested instruction number 18, reading as follows: "You are instructed that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive [578] speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed." Upon the grounds and for the reason that the law of the State of Idaho is to the effect that the guest in the automobile is under the necessity of protesting and the failure to protest against the excessive speed, the conduct contributing to the accident, when such guest has an opportunity to do so, and this should preclude the recovery for injuries and damages by such conduct of the said guest.

The defendants object and except to the refusal to give instruction numbered 20 requested by the defendants reading as follows: "The court instructs the jury that the answer of the defendants in this case alleges affirmatively that any injury caused Avenel Newby was due to her own acts of negligence. This is equivalent to an allegation that the contributory negligence of Avenel Newby had a causal connection with the injury. The burden of establishing contributory negligence by a preponderance of the evidence rests upon the defendants. This burden may be discharged but never shifted. You are instructed that the burden is upon the de-

fendants under their charge of contributory negligence to prove not only that Avenel Newby was negligent but that her negligence contributed to and had a causal connection with her death. If, however, contributory negligence appears on the plaintiffs' side of the case and from the plaintiffs' [579] witnesses, whether the same be by direct examination or under cross examination, and from such testimony you find that there was contributory negligence in this case, then and in that event you are instructed that you should consider such defense even though no testimony was offered affirmatively by the defendants in the proof thereof. In this connection, you are further instructed that contributory negligence means: Negligence on the part of Avenel Newby either by an act on her part or omissions when a reasonable person would have acted in an effort to prevent the injury, and which negligence helped to cause or bring about the injury complained of, and you are further instructed that if you believe the said Avenel Newby could have prevented the injury, and failed to do so, you should find for the defendants." For the reason that under the facts in this case the question of contributory negligence of Avenel Newby is supported by the evidence and is a defense pleaded and asserted herein and that the said matter should be submitted to the jury for its consideration as such defense.

Defendants except to the refusal on the part of the Court to give requested instruction number 21 reading as follows: "You are further instructed,

that a gratuitous guest may not recover for his host's negligent operation of an automobile if conscious of apparent danger, or advised of such conditions and circumstances as would herald danger to a reasonably prudent person, he fails opportunely to protest [580] and acquiesces therein, and if you find from the evidence in this case that Avenell Newby knew, or as a reasonably prudent person should have known, that Rulon D. Hair was operating and driving said automobile in a dangerous manner, and you further find that Avenell Newby after a seasonably opportunity so to do, failed to opportunely protest against such dangerous driving and operations of said automobile, then, and in that event, the plaintiffs cannot recover." For the reason and upon the ground that the pleadings and evidence in this case is such as to render it necessary to advise the jury with reference to the conduct and duty of the guest in the car and which requires such guest to seasonably protest and object to the conduct of the driver of the car, and that the law is such that if she failed so to do she would have assumed all the risk and cannot recover in this case.

Defendants excepts to the refusal of the Court to give defendants' requested instruction numbered 22, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under

the influence of intoxicating liquor, then and in that event you are instructed that the said Avenel Newby assumed the [581] risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case." For the reason that the law of Idaho is to the effect if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile and there is sufficient evidence in this case to require the giving of such instruction.

For the assigned reasons and various other reasons having application to this case the instructions given and objected to herein did not state the law covering the trial and controlling in this case, but tended to confuse and mislead the jury and that the requested instructions which were not given, state the law applicable to the facts in this case and were necessary for the protection of the rights of these defendants.

Mr. Davis: Comes now the plaintiffs and excepts and objects to the giving of the instruction to the jury reading as follows: "You are instructed, that there has been evidence introduced in this cause touching an action in which Rulon D. Hair was involved in Pocatello, Idaho, in April, 1939, and certain litigation which resulted from that accident. The only purpose for which such evidence was [582] admitted was upon the question of whether or not the R. J. Reynolds Tobacco Company and L. R. Don-

nelly knew of said action and whether or not such knowledge, if they had it, could be considered as a waiver of their instructions against Hair hauling guests and you should not consider any of this evidence as bearing upon any of the other issues in this case.” For the reason that the following language: “You should not consider any of this evidence as bearing upon any of the other issues in this case,” unduly limits the evidence of the accident in April 1939 to the question of waiver only, and that the plaintiffs are entitled to have all the evidence as to all of the acts shown to have been brought to these defendants’ attention and knowledge and to have it considered by the jury on all phases of the case; for the reason that any act that is brought to the knowledge of the defendants in this case is notice to them of recklessness, and whether it be in reference to a prior accident or whether it be as to waiver or as to guests, it should be considered by the jury.

(The jury retired to consider its verdict and returned with a verdict later the same day.)

March 24, 1945, 10 A. M.

Mr. Davis: I am directing the Court’s attention to the fact that the verdict was rendered in favor of the plaintiffs and also to the showing made by Mr. Newby on the motion to stay proceedings until the costs were paid. [583] Mr. Newby set forth in his affidavit that he was agreeable that the judgment against him in the Circuit Court of Appeals for costs on appeal might be credited against any judgment that he might receive against the defendants

in this case, and I now offer, if the Court please, on behalf of the plaintiffs in this case, that the amount of costs that were awarded against the plaintiff in the Circuit Court of Appeals be credited on the judgment that is now to be entered and we agree and stipulate that if any execution is issued upon the judgment secured by the plaintiff that the defendants may have credit for the amount of costs awarded against Newby in the judgment of reversal by the Circuit Court of Appeals. In fact I am willing to have this done either way counsel for the defendants desire.

The Court: It is your desire that the clerk enter judgment in accordance with the verdict, and then enter the costs or do you desire to credit the costs against the amount of the judgment.

Mr. Merrill: I don't think we should be put on that spot. We have excepted to the verdict and if this should be appealed we do not want to be, and ought not be put in the position where we have waived this item. I fear there might be a waiver of this item.

The Court: I don't see how it would be effected in any way in directing the Clerk to enter the [584] judgment. The judgment, I feel sure, should be entered giving credit for the costs as so ordered by the Court, but if you feel that should not be done, then the Clerk would necessarily enter judgment for the full amount of the verdict. If you don't consent to it, I took that into consideration in denying the stay. If you don't want to agree to that at this time

I think the proper procedure would be for the clerk to enter judgment for the full amount.

Mr. Merrill: I don't see how I can agree to that at this time.

The Court: Then the clerk, I presume, will have to enter judgment on the verdict in view of the position counsel has taken.

Mr. Merrill: I haven't taken any position.

The Court: I understood you to say that you couldn't agree to any arrangement at this time.

Mr. Merrill: If it is credited on the judgment I want it understood that we would not be deprived of the attempt to collect it in the event this present judgment should be overruled by the Circuit Court of Appeals.

The Court: I think the best way to handle it under the circumstances is to have the judgment entered for the full amount as set up in the jury's verdict with the understanding that at any future date this amount may be credited on that judgment. [585]

CERTIFICATE

State of Idaho, County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting official Reporter of the District Court of the United States, in and for the District of Idaho, do hereby certify that I reported in shorthand the testimony of the witnesses sworn on behalf of the respective parties in the above entitled cause, and also that I reported the proceeding had in and about the trial of the said cause, and that I thereafter transcribed said shorthand notes into longhand,

typewriting, and that the within and foregoing constitutes and is a full, true and correct copy of the transcript of the testimony given and the proceedings had in the said cause, consisting of pages numbered 1 to 465, excluding this certificate.

In witness whereof, I have hereunto set my hand this first day of September, 1945.

G. C. VAUGHAN

Official Reporter.

[Endorsed]: Filed Sept. 5, 1945. [586]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY R. J. REYNOLDS TOBACCO
COMPANY.

Comes now the appellant, R. J. Reynolds Tobacco Company, one of the above named defendants, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Petition for order appointing guardian ad litem.
3. Order appointing guardian ad litem.
4. Order for removal to the United States District Court for the District of Idaho, Eastern Division.

5. Motion to dismiss and to make more definite and certain by Rulon D. Hair.

6. Order on Motions.

7. Demand for jury trial.

8. Amended Complaint.

9. Motion to dismiss, motion for more definite statement, and motion to strike, directed to amended complaint, by R. J. Reynolds Tobacco Company and L. R. Donnelly.

10. Order re motion to dismiss, etc., of R. J. Reynolds Tobacco Company and L. R. Donnelly.

11. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly to amended complaint [587]

12. Answer of defendant, Rulon D. Hair, to amended complaint.

13. Verdict of jury, October 23, 1943, on first trial of case.

14. Judgment on Verdict, October 23, 1943, on first trial of case.

15. Notice of appeal filed by R. J. Reynolds Tobacco Company and L. R. Donnelly, dated January 20, 1944, from judgment entered October 23, 1943, at conclusion of first trial.

16. Cost bond on appeal, of R. J. Reynolds Tobacco Company and L. R. Donnelly, from judgment entered at conclusion of such first trial.

17. Mandate on reversal, of United States Circuit Court of Appeals for the Ninth Circuit, dated December 8, 1944, filed December 11, 1944, together with amount of costs allowed and taxed.

18. Motion of R. J. Reynolds Tobacco Company

and L. R. Donnelly for an order staying further proceedings until costs taxed of \$740.12 against plaintiffs on the appeal, in the United States Circuit Court of Appeals for the Ninth Circuit, are paid, together with affidavit of A. L. Merrill in support of such motion, and affidavits of B. W. Davis and George H. Newby in opposition, and Court's minute of denial of said motion dated March 14, 1945.

19. Verdict of jury, March 23, 1945, on second trial of case.

20. Judgment on Verdict, March 24, 1945, on second trial of case.

21. Petition on motion for judgment notwithstanding verdict and, in the alternative for a new trial, and motion for a new trial filed by R. J. Reynolds Tobacco Company.

22. Affidavit of A. L. Merrill in support of motion for new trial.

23. Affidavit of B. W. Davis in opposition to motion for new trial.

24. Court's order denying motion of R. J. Reynolds Tobacco Company for judgment notwithstanding verdict and in the alternative for a new trial, and motion for a new trial.

25. Notice of appeal filed by R. J. Reynolds Tobacco Company.

26. Cost bond on appeal of R. J. Reynolds Tobacco Company. [588]

27. Petition of R. J. Reynolds Tobacco Company for approval of Supersedeas Bond and Stay on Appeal.

28. Order approving bond and granting stay of execution against R. J. Reynolds Tobacco Company.

29. All testimony taken at second trial contained in reporter's transcript, including all instructions given to the jury, and all instructions refused and exceptions taken thereto; two copies of such transcript copy, including such instructions and exceptions, are herewith filed with the clerk.

30. The exhibits to be printed in the record, to-wit:

Exhibits numbered:

14. Report of L. R. Donnelly, dated September 15, 1942.

17. Salesman's agreement on delivery of car.

19. Instructions of R. J. Reynolds Tobacco Company and answer of Rulon D. Hair, dated March 17, 1938.

20. Letter of commendation to Rulon D. Hair, dated June 12, 1940.

24. Certified copy of court record in the case of State of Idaho vs. Rulon D. Hair, being the information and verdict of the jury and certificate .

25. Letter of E. A. Darr. (Page 36 of Darr's deposition).

26. Letter of R. J. Reynolds Tobacco Company to salesmen, November 4, 1937.

31. Stipulation re Exhibits.

32. Order re Exhibits.

33. All court minutes.

34. Two copies of reporter's transcripts, second trial.

35. Designation of contents of record on appeal of R. J. Reynolds Tobacco Company, and proof of service. [589]

36. Statement of points by R. J. Reynolds Tobacco Company, and proof of service.

Dated this 15th day of June, 1945.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company.

Service of the foregoing Designation of Contents of Record on Appeal, by receipt of copy thereof, admitted to have been made this 15th day of June, 1945.

GLENN A. COUGHLIN,

B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed June 15, 1945. [590]

[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT R. J. REYNOLDS TOBACCO COMPANY INTENDS TO RELY ON APPEAL.

Comes now R. J. Reynolds Tobacco Company, one of the above named defendants, and appellant, and makes the following statement of points upon which it intends to rely on the appeal taken by it to the Circuit Court of Appeals for the Ninth Circuit in the above entitled cause:

I.

The Trial Court should have required the plaintiffs to elect as between two theories advanced in the amended complaint, that is to say, whether they relied for recovery upon the charge of direct negligence against these appellants, or upon the rule of respondent superior as applied to Rulon D. Hair.

II.

There was no negligence on the part of this appellant proximately causing the injury alleged in the amended complaint; further Rulon D. Hair was not acting as a servant, agent or employee of appellant, nor within the scope of any employment for appellant, at the time of the accident alleged in the amended complaint.

III.

The Trial Court should not have permitted introduction at the trial of the cause, various items of evidence appearing in the transcript of the evidence and to which appellant interposed objections, particularly the testimony of the witnesses Smullen, Buskirk, Pugmire, [591] L. R. Donnelly, relating to the so-called Meyers incident; also the testimony of the witnesses Buskirk, Pugmire and Close relating to the reputation of Rulon D. Hair as a driver of an automobile; also the introduction of evidence relating to various other and outside incidents; in failing to sustain appellant's objections to the introduction of such evidence and in failing to strike the

same and in failing to instruct the jury to disregard such testimony, and in permitting plaintiffs, over objection of appellant, to introduce part of the deposition of E. A. Darr on cross examination before any direct examination had been offered; in admitting in evidence various exhibits objected to and particularly Exhibit No. 24, being a certified copy of Information and Verdict of Jury in the case of State of Idaho vs. Rulon D. Hair. that recitation of the foregoing items is not deemed exclusive, in that there are various other claimed errors committed in the admission and rejection of evidence, as disclosed by the record of the testimony in said cause.

IV.

The evidence introduced at the trial of said cause was wholly insufficient to justify or sustain a verdict against appellant upon any theory; more particularly, the evidence fails to show appellant guilty of negligence in employing and continuing in its employment Rulon D. Hair and delivering to him the panel truck referred to in the amended complaint, and further insufficient to prove that Hair had a status of a drunken and incompetent driver.

V.

The evidence conclusively proved that at the time of the accident alleged in the amended complaint, Rulon D. Hair was not acting within the scope of any employment for and on behalf of appellant.

VI.

The evidence is further insufficient to show that, at the time of said accident, Rulon D. Hair was in anywise guilty of violating the gratuitous guest statute of the State of Idaho, or that appellant was in anywise liable for the conduct of Rulon D. Hair.

VII.

The trial court should have granted the motion for a directed verdict in favor of appellant upon the grounds made at the close of the evidence and restated in its petition on motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, filed in said cause following the verdict of the jury, for the reasons and upon the grounds stated in said petition and motion.

VIII.

There was no waiver on the part of appellant of its injunction that Rulon D. Hair should not transport a guest in said panel truck.

IX.

Avenell Newby was riding in the panel truck as a gratuitous guest of Rulon D. Hair and not of appellant, and appellant was in nowise responsible for the conduct of Rulon D. Hair at the time of said accident; that Avenell Newby participated in all of the acts of Rulon D. Hair and joined with him in each and every act performed prior to the accident, and was in a position to be as observant of surround-

ing conditions immediately preceding said accident and of all acts of commission or omission on part of Rulon D. Hair, if any there were, as was Hair himself, and, having thus joined with Hair in said trip and in the conduct thereof, became barred and estopped, and the plaintiffs and appellees became barred and estopped from claiming damages for any injury that might have been sustained by Avenell Newby as a gratuitous guest of Rulon D. Hair. [593]

X.

Avenell Newby assumed any and all risk attendant upon the trip with Rulon D. Hair, and, by reason of the matters and things recited in the testimony, became estopped from claiming damages by reason of anything suffered or permitted at the time and place mentioned in the amended complaint, which estoppel is effective as against the plaintiffs and appellees.

XI.

There should not have been given to the jury those certain instructions to which objection was made by appellant at the time said instructions were given, and there should have been given to the jury those requested instructions presented by appellant and refused by the trial court.

XII.

The trial court erred in failing and refusing to consider and recognize the derivative liability of appellant, if any there was, as resting upon or hav-

ing been derived from the original liability of Rulon D. Hair, in the event any such liability existed and not otherwise.

XIII.

Without waiving the general objections to the instructions given and those refused, referred to in Paragraph XI hereof, the trial court erred in instructing the jury that if it found in favor of the plaintiffs, that the amount of damages allowed should in no event exceed the amount prayed for in plaintiffs' complaint, and in failing to instruct the jury that in the event the jury should find in favor of plaintiffs and appellees its verdict could not exceed a maximum sum of \$7,500.00, for the reason that the verdict and the judgment thereon rendered and entered at the conclusion of the first trial in this cause and for said sum and the same became final and conclusive against Rulon D. Hair in that neither Rulon D. Hair nor plaintiffs and appellees perfected any appeal from such verdict and judgment [594] and thereby became the maximum measure of damages, if any, which could have been found against appellant by the jury.

XIV.

The jury, having failed to find against the defendant, L. R. Donnelly in this case, could not properly find against this appealing defendant, R. J. Reynolds Tobacco Company.

XV.

The verdict of the jury is excessive and was rendered under passion and prejudice and a misunderstanding of the law and facts, and the trial court should have set aside the verdict and the judgment rendered thereon and should have granted appellant's petition on motion for judgment notwithstanding the verdict and in the alternative for a new trial upon the grounds, as well as other grounds, urged in said petition and motion.

XVI.

Generally, there was no negligence on the part of appellant proximately causing the death of Avenell Newby, and appellant was in nowise liable or responsible at the time and place of said accident for acts of commission or omission, if any there were; by Rulon D. Hair; that at said time and place Rulon D. Hair was not acting within the scope of his employment as an agent, servant or employee of appellant, and it is in nowise liable under the guest statute of Idaho, or otherwise, to the appellees in this cause; that evidence prejudicial to appellant was improperly admitted at the trial of said cause, and the court on motion of appellant refused to strike evidence improperly admitted; that the trial court gave to the jury erroneous instructions and improperly refused to give certain requested instructions; that the verdict against appellant and the judgment entered thereon is excessive and erroneous and in nowise supported by the evidence or the law governing and controlling this action. [595]

Dated June 15th, 1945.

E. B. SMITH,
A. L. MERRILL,
R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company.

Service of the foregoing Statement of Points by receipt of copy thereof admitted to have been made this 15th day of June, 1945.

GLENN A. COUGHLIN,
B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed June 15, 1945. [596]

[Title of Court and Cause.]

AMENDMENT TO DESIGNATION OF CON- TENTS OF RECORD ON APPEAL

Comes now R. J. Reynolds Tobacco Company, one of the above named defendants, having heretofore filed its Designation of Contents of Record on Appeal and being now desirous of adding to said Designation the Motion to Dismiss and Make More Definite and Certain filed by R. J. Reynolds Tobacco Company, and, by reason of a stipulation and order thereon heretofore made and filed transmitting Exhibit 14 in its original form and deleting said Exhibit from Designation Number 30, hereby amends said Designation of Contents of Record on Appeal as follows:

Amends Designation Number 5 to read:

“5. Motions to Dismiss and to Make More Definite and Certain by R. J. Reynolds Tobacco Company and L. R. Donnelly, and by Rulon D. Hair.”

Delete from Designation Number 30, the following:

“14. Report of L. R. Donnelly, dated September 15, 1942.”

Add a new designation to read as follows:

“37. Amendment to Designation of Contents of Record on Appeal of R. J. Reynolds Tobacco Company and Proof of Service.”

Dated this 30th day of July, 1945.

E. B. SMITH,
A. L. MERRILL,
R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company. [597]

Service of the foregoing Amendment to Designation of Contents of Record on Appeal by receipt of copy thereof, admitted to have been made this 30th day of July, 1945.

GLENN A. COUGHLIN,
B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed August 4, 1945. [598]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRANS-
SCRIPT OF RECORD.

United States of America, District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 598, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$66.95, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 5th day of September, 1945.

[Seal]

ED. M. BRYAN,
Clerk.

[Endorsed]: No. 11137. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Reynolds Tobacco Company, a Corporation, Appellant, vs. George H. Newby, in His Own Behalf, Richard Arlen Newby and Patty Ann Newby, Both Minors, by Their Guardian ad litem, George H. Newby, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the District of Idaho, Eastern Division.

Filed September 11, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11137

R. J. REYNOLDS TOBACCO COMPANY,
Appellant,
vs.

GEORGE H. NEWBY, in his own behalf, RICH-
ARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their guardian ad
litem, GEORGE H. NEWBY,
Appellees.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF.

Comes Now the appellant and hereby adopts as its Statement of Points upon which it intends to rely on appeal, the Statement of Points on which Appellant, R. J. Reynolds Tobacco Company, Intends to Rely on Appeal, heretofore filed with the Clerk of the United States District Court for the District of Idaho, from which Court this appeal is taken, such Statement of Points being that appearing in the transcript certified to this Court for said Clerk of the United States District Court for the District of Idaho.

The appellant hereby designates for printing, as the parts of record necessary for the consideration

of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits which are enumerated in Paragraph numbered 30 of the Designation of Contents of Record on Appeal by R. J. Reynolds Tobacco Company, and Amendment to Designation of Contents of Record on Appeal, expressly specifying, however, that the exhibits not therein requested to be printed be not printed, being Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 27, referred to in the Stipulation relating thereto filed with said Clerk of the United States District Court for the District of Idaho and appellant prays that such exhibits be considered in their original form by this Court as a part of the record on such appeal.

E. B. SMITH,

A. L. MERRILL,

R. D. MERRILL,

Attorneys for Appellant.

Service of the foregoing Statement admitted to have been made this 10th day of September, 1945.

GLENN A. COUGHLAN,

B. W. DAVIS,

Attorneys for Appellees.

[Endorsed]: Filed Sept. 17, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of R. J. Reynolds Tobacco Company respectfully shows:

That an appeal has been perfected by your petitioners to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by and through George H. Newby, their guardian ad litem, were plaintiffs, and R. J. Reynolds Tobacco Company and L. R. Donnelly were defendants.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to-wit:

Plaintiffs' Exhibits numbered 1 to 6, inclusive; 9 to 16, inclusive; 24, 25 read from deposition of E. A. Darr; also Defendants' Exhibits numbered 7, 8, 17; 18 read from deposition of E. A. Darr; 19, 20; 21 and 22 read from deposition of E. A. Darr; 26 and 27.

That Plaintiffs' Exhibits numbered 24 and 25, and Defendant's Exhibits numbered 17 to 22, inclusive, and 26 will be printed in full in the record.

That the exhibits which appellant and appellees believe would be impractical and difficult to print and for which no application to print has been made, are: Plaintiffs' exhibits numbered 1 to 6,

inclusive; 9 to 16, inclusive; also Defendant's Exhibits numbered 7, 8 and 27; being two maps, photographs, and involved printed reports and records, which appellant and appellees believe would be impractical and difficult to print, being referred to in the stipulation by appellant and appellees filed with the Clerk of the United States District Court for the District of Idaho, from which Court said appeal has been taken, such exhibits to be taken and considered as a part of the record on such appeal.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of E. B. Smith, which is made a part hereof.

Wherefore, your petitioners pray for an order dispensing with the printing of Plaintiffs' Exhibits numbered 1 to 6, inclusive; 9 to 16, inclusive, and Defendant's Exhibits numbered 7, 8, and 27; and that the said original exhibits be considered by this Court on such appeal.

R. J. REYNOLDS TOBACCO
COMPANY.

By E. B. SMITH.

By A. L. MERRILL.

R. D. MERRILL,

Attorneys for Appellant.

So ordered.

CLIFTON MATHEWS,
United States Circuit Judge.

Filed: September 17, 1945.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF E. B. SMITH

State of Idaho,

County of Ada—ss.

E. B. Smith, being first duly sworn, deposes and says:

That he is one of the attorneys for R. J. Reynolds Tobacco Company, appellant herein, and makes this affidavit on behalf of appellant for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the Application for Order attached hereto.

That judgment was rendered herein in favor of the plaintiffs and against the defendant on March 24, 1945; that on June 13, 1945, defendant R. J. Reynolds Tobacco Company perfected an appeal to this Court by filing its Notice and Undertaking on Appeal, and has since served and filed the additional papers required by the rules of this Court.

That on July 2, 1945, the Honorable Chase A. Clark, District Judge, made an order directing the original exhibits, numbered 1 to 16, inclusive, and 27, be forwarded to this Court with the record on appeal to be used on such appeal, following stipulation of the parties through their respective counsel of record, entered into on June 27th, 1945, and duly filed, to the effect that such exhibits are of such character as to be difficult to print and can best be considered by the appellate court in their original form, thus leaving for printing such exhibits as do not offer difficulty in printing; that the exhibits which it is requested be not printed present diffi-

culties in printing and would decidedly encumber the record, as will more particularly appear from an examination of said exhibits, and that such exhibits may probably serve the appellate court better in their original form.

E. B. SMITH.

Subscribed and sworn to before me this 8th day of September, 1945.

[Seal] WILLIS C. MOFFATT,
Notary Public for Idaho, residing at Boise, Idaho.
My Commission Expires January 28, 1946.

Copy of foregoing application for order admitted this 10th day of September, 1945.

GLENN A. COUGHLAN,
B. W. DAVIS,
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Filed Sept. 17, 1945. Paul P. O'Brien, Clerk.

